JD(NY)—26—03
Hartford, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH

DOWNTOWN HARTFORD YMCA

and

Case Nos. 34—CA—10011
34—CA—10107
34—CA—10142

SERVICE EMPLOYEES INTERNATIONAL UNION, 32BJ DISTRICT 531, AFL-CIO

Darryl Hale, Esq., and Quesiyah Ali, Esq.,
for the General Counsel.
Felix J. Springer, Esq., and Stacy Babson-Smith, Esq.,
of Day, Berry & Howard, Hartford, CT, for the Respondent.
Thomas Meikeljohn, Esq., of Livingston, Adler, Pulda,
Meikeljohn & Kelly, Hartford, CT, for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Hartford, Connecticut on August 19 – 23 and September 17 – 20, 2002.[1] The charges in Case Nos. 34-CA-10011, 10107 and 10142 were filed by Service Employees International Union, 32BJ District 531, AFL-CIO ("the Union") on January 23,[2] April 23 and June 4, respectively, and the amended consolidated complaint issued July 29.[3] The complaint, as further amended at the hearing, alleges that the Respondent, Downtown Hartford YMCA, violated Sections 8(a)(1), (3) and (5) of the Act in connection with its January decision to terminate its contract with Pritchard Industries, Inc. and convert to an in-house housekeeping, laundry and janitorial operation.[4] On August 12, the Respondent filed its answer to the amended consolidated complaint denying the unfair labor practice allegations and asserting several affirmative defenses.

The complaint specifically alleges that the Respondent violated Section 8(a)(1), on various dates in January and early February, by restricting the Union's access to Pritchard's employees who were working at its facility, by implementing discriminatory no solicitation and distribution rules affecting the same Pritchard employees, by threatening to and causing the arrest of a Union representative in the presence of the employees, by threatening employees with being sent home if they communicated with the Union's representative or engaged in union

[1] All dates are in 2002 unless otherwise indicated.
[2] The Union amended the charge in Case No. 34-CA-10011 on March 18 and April 23.
[3] A consolidated complaint had previously issued in Case Nos. 34-CA-10011 and 10107 on May 31.
[4] The General Counsel, in his brief, withdrew an allegation that the Respondent had also violated Section 8(a)(1) and (4) of the Act by its failure and refusal to hire one employee.

solicitation or distribution at the Respondent's facility, and by making statements to Pritchard employees indicating that they would not be hired by the Respondent because of their Union membership and because the Union had filed the charge in Case No. 34-CA-10011. The complaint further alleges that the Respondent violated Section 8(a)(1) and (3) by failing and refusing to hire 12 named Pritchard employees because of their membership in, support for and concerted activities on behalf of the Union. Finally, the complaint alleges that the Respondent, as a successor to Pritchard, has violated Section 8(a)(1) and (5) of the Act, since February 4, by failing and refusing to recognize the Union as the Section 9(a) representative of its housekeeping, laundry and janitorial staff and by unilaterally establishing the rates of pay, benefits, hours of work and other terms and conditions of employment for those employees. The complaint does not allege that the Respondent's decision to take over the housekeeping, laundry and janitorial functions at its facility was unlawfully motivated or that the Respondent had any obligation under the Act to bargain with the Union regarding this decision. The complaint also does not allege that Pritchard Industries engaged in any unfair labor practices in connection with its termination of operations at the Respondent's facility.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a branch of a non-profit corporation, provides various services and programs to individuals in the greater Hartford, Connecticut community at its facility at 160 Jewell Street in Hartford, Connecticut. There is no dispute that the Respondent, in the conduct of its operations at the Hartford branch, annually derives gross revenues valued in excess of $250,000 and purchases and receives goods valued in excess of $5,000 directly from points outside the State of Connecticut. The Respondent has essentially admitted and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the Parties' stipulation at the hearing, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Respondent's Decision to Take Over Housekeeping, Janitorial and Laundry Services*

The Respondent provides a number of services to the community at its downtown Hartford branch, including physical fitness programs, a day care center and a residence. The facility consists of an 11-story building with 127 rooms for residents on the 7th through 11th floors. The fitness facility, including a pool, locker rooms and gymnasiums, is located on the first two floors. The day care center is located on the first floor. The Respondent also has a cafeteria that is open to the general public for most of the day. Most of the Respondent's offices are on the third floor.

Until about 1996, the Respondent performed its cleaning, janitorial and laundry services in-house. In about 1996, the Respondent hired Servus Corporation, a building maintenance company, to handle these functions. Servus, in turn, hired Pritchard, a general cleaning contractor, to provide the housekeepers, night custodians, and day porters (janitors) to clean the building, and the laundry attendants to clean the towels and linens used in the fitness center

and residences. The Respondent continued to employ its own staff of skilled maintenance technicians to maintain the mechanical operations in the building. In January 2001, the Respondent replaced Servus with another building management company, O, R & L, which retained Pritchard as the cleaning contractor. In June, 2001, still not satisfied with the services provided by O, R &L, the Respondent hired James O'Hair, who had experience managing hotels, to be the full-time building superintendent with overall responsibility for the maintenance of the facility, including the work of Pritchard's employees. Shortly after he was hired, O'Hair terminated the services of O, R & L and brought in his own staff of mechanics to handle the in-house maintenance functions, including new supervisor Ronald Gagnon. He retained Pritchard to do the cleaning, janitorial and laundry work.

Pritchard has been a union contractor since it was first hired to work at the Respondent's downtown branch. It has been signatory to successive collective-bargaining agreements negotiated by the Union with an association of cleaning contractors in Hartford County. The contract in effect at the time of this dispute was effective through May 31, 2003. In late 2001-early 2002, Pritchard employed a staff of 14 full- and part-time employees at the Respondent's Hartford facility, including two employees (Reese Dinkins and Kathleen Nelson) who had worked at the facility since before Pritchard was hired. Tony Bertini, employed by Pritchard as its area manager, was responsible for Pritchard's account with the Respondent from approximately January 2001 until the relationship ended in January 2002. The Respondent's account was one of only two for which Bertini was responsible during this period. Although not assigned to work on-site, Bertini had almost daily contact with O'Hair after O'Hair was hired and frequently visited the Respondent's facility to check on the work of Pritchard's employees.

Correspondence in evidence from 1999 and 2000 shows that the Respondent, directly and through its building managers, had continuously sought cost reductions from Pritchard that resulted in the reduction of the amount of services provided by Pritchard's employees. At the same time, the Respondent continuously complained about the quality of the cleaning provided by Pritchard's staff. In early 2001, after O, R & L was hired, Pritchard was forced to remove on-site supervision from the facility to meet O, R & L's new bid specifications. This tension between the Respondent's desire for a spotlessly clean facility and its unwillingness to pay Pritchard a fee which Pritchard considered sufficient to cover the cost of satisfying the Respondent's demands is what ultimately led to the Respondent's termination of Pritchard's services.

O'Hair testified that, after he took over as building superintendent, he worked with Bertini to develop an ideal set of cleaning specifications to achieve the level of service the Respondent desired. In the process of doing this, O'Hair would frequently advise Bertini of deficiencies he saw in the work being done by Pritchard's employees. There is no dispute that Bertini informed O'Hair that the lack of on-site supervision was a significant factor in the problems O'Hair complained about. Also during the first several months of O'Hair's tenure, Pritchard sought some assurance, in the form of a written contract, that the Respondent was going to retain its services.[5] The discussions between the Respondent and Pritchard reached a head on or about September 27, 2001 when Pritchard's Vice President, Steven Sadler, sent O'Hair a letter demanding a fee increase of $860/month, effective October 1, 2001, to cover increased payroll related expenses and increased operating expenses. Attached to the letter was a financial summary purporting to show that Pritchard was losing money attempting to satisfy the Respondent's demands while waiting for approval by the Respondent of Pritchard's most recent bid proposal. Sadler pointed out, in his letter, that the specifications under which it was currently

[5] There is no dispute that Pritchard had been working under a verbal agreement to provide services to O, R & L that had never been reduced to writing.

operating did not include adequate supervision or on-site management. Sadler advised O'Hair that, if the Respondent did not agree to this increase, Prichard would exercise its right to terminate the existing relationship on thirty-days notice.

O'Hair discussed Sadler's demand with Andre Kennard, the Respondent's Executive Director.[6] According to O'Hair, the Respondent agreed to pay the additional $860/month because of his conclusion that the Respondent would not have been able to replace Pritchard's staff and maintain an acceptable level of cleaning in 30 days. The new monthly cost to the Respondent was about $29,000. When O'Hair communicated the Respondent's agreement to Pritchard, he and Sadler agreed that Bertini would work with O'Hair on a new set of specifications to ensure that the Respondent got the level of service it desired. On October 19, 2001, Bertini and Pritchard's estimator, David Berthold, met with O'Hair and presented a cost summary with the revised specifications. These specifications included provision for the return of on-site supervision. The total cost to Respondent proposed by Pritchard was more than $37,000/month, the bulk of which was payroll costs for Pritchard's unionized workforce.[7]

O'Hair concluded, after reviewing Pritchard's proposal and discussing with Bertini the performance specifications, that the Respondent could do the work cheaper itself. O'Hair made this recommendation to Kennard who instructed him to come up with a proposal to take the cleaning, janitorial and laundry services in-house. O'Hair continued to work with Bertini to "resolve their differences", i.e. between the Respondent's expectations of what was attainable and the reality of what could be accomplished under the current contractual arrangements. As part of this process, O'Hair and Rachel Soucy, the Respondent's Housing Director, conducted a room-by-room inspection of the residential section of the facility with Bertini. During that inspection, many mechanical problems unrelated to the work of Pritchard's employees were uncovered. The inspection also disclosed many issues regarding the cleanliness of the residential rooms and bathroom facilities that Bertini agreed to address. Bertini assigned a special crew to correct the areas noted on inspection at Pritchard's expense.

While ostensibly working with Bertini to resolve the Respondent's problems with the level of service it was getting from Pritchard, O'Hair developed his proposal to take these services in-house. O'Hair admitted that he used input from Bertini to develop the job descriptions and work schedules for the staff he intended to hire upon termination of Pritchard's contract. According to O'Hair, Bertini was well aware that he was doing this at the time.

Sadler testified that, on December 13, he and Berthold visited O'Hair at the Respondent's facility to check on the status of Pritchard's proposal to continue performing services for the Respondent. According to Sadler, at this meeting O'Hair asked Sadler what would happen if the Respondent took over the cleaning, janitorial and laundry operations. Sadler replied that the Respondent might not achieve the cost savings it was looking for because the employees were represented by the Union and the Union was committed to the employees and to maintaining a presence in the building. Sadler recalled that O'Hair said the Union was not an issue, that it had been checked out with lawyers, that this was not an issue he was concerned about, he was concerned with getting the building cleaned and the problems fixed. During this meeting, Sadler offered to have Pritchard put a supervisor in the building at no expense to the Respondent because of his belief that the problems O'Hair complained about were due to the lack of supervision. O'Hair responded that it "wouldn't hurt" if Pritchard brought

[6] Kennard was also somewhat new to the Respondent's organization, having assumed his position in January 2001.

[7] Pritchard's proposal included a 7.5% profit margin.

in a supervisor, but it wouldn't guarantee them a contract.

Shortly after this meeting, O'Hair gave Pritchard its thirty-days notice that it had decided to terminate the laundry service provided by Pritchard. By letter dated December 20, 2001, Sadler advised the Respondent that the termination of the laundry service would reduce the Respondent's monthly fee by about $4300.[8] On December 27, 2001, O'Hair notified Sadler, in writing, that the Respondent was terminating Pritchard's housekeeping and janitorial services effective February 1. O'Hair also advised Sadler that the Respondent would be hiring employees directly to perform these services. There is no evidence in the record that Pritchard ever communicated to the Union or the employees working at the Respondent's facility that the Respondent was terminating its services and hiring employees to do the work. In fact, the evidence in the record establishes that the Union and most of the employees did not find out about the Respondent's decision until a help-wanted advertisement appeared in the Hartford newspaper on Sunday, January 6, seeking applications for the very jobs held by Pritchard's employees.

B. *The Union Reacts to the Respondent's Decision*

Upon learning of the Respondent's decision to end its relationship with Pritchard, the Union's District Supervisor, Kurt Westby, assigned Sal Abate, a union delegate who is no longer employed by the Union, to call the Respondent and find out what was going to happen to the work being performed by Pritchard's employees. Abate testified that he received this assignment on January 7 and called the Respondent that day. After learning from the receptionist that O'Hair was responsible for the cleaning services at the facility, Abate left him a voicemail message, identifying himself as a Union representative and asking that O'Hair call to discuss the situation with Pritchard. There is no dispute that O'Hair returned Abate's call that day, leaving a message for Abate who was not in, and that the two ultimately had a telephone conversation the next day, January 8.

According to Abate, he opened the conversation by introducing himself as a union delegate and telling O'Hair that he was calling to find out what was going on with the Respondent's contract for cleaning services and the employees currently working there. O'Hair replied that the Respondent had made a decision to keep the cleaning services in-house. Abate recalled that O'Hair said that in the eight years he had been with the Respondent, he had seen a transition to in-house services from outside contractors and that other departments that had made the change were running smoothly. Abate then suggested that they set up a meeting where he and the workers could present a copy of the collective-bargaining agreement for the Respondent to sign and whatever pension information O'Hair need to become a union signatory. O'Hair replied that there was an application process he had set up and that if any of the workers wanted to apply they could pick up an application at the front desk.[9] In response to this, Abate suggested that he and O'Hair set up a date and time when the Pritchard employees could be interviewed to ensure a fair and orderly process. Abate recalled, with asserted clarity, that O'Hair said he was "not interested in meeting with a group of union workers."

Abate testified that O'Hair also mentioned, in the course of the conversation, that the Respondent had received an "overwhelming" response to the ad. He further recalled O'Hair

[8] This is the reduction from the current fee the Respondent was paying. The $37,000+ fee proposed in October to achieve the optimal level of cleanliness did not include laundry services.

[9] In his pre-trial affidavit, Abate stated that O'Hair told him that the Respondent was hiring new janitors and cleaners and that there was an application process in place.

saying that, although the Pritchard employees could apply, he did not think he would be hiring many of them because he was not happy with the work they were doing. When Abate responded that was a management problem, that the employees were only following what their supervisors told them to do, O'Hair cut him off, saying "don't use the 'bad management' argument", that he had seen managers come and go and things never got any better. Abate reported the substance of this conversation to his boss, Westby, and, as will be discussed, with the Pritchard employees. He had no further conversations with O'Hair and only limited involvement in this matter thereafter.

O'Hair prefaced his testimony regarding this conversation with testimony regarding conversations he allegedly had with Sadler and Bertini in the nature of a warning, or "heads-up" about the Union. O'Hair was vague as to when these conversations occurred but claimed to have had one with Sadler and at least one with Bertini before he received Abate's message.[10] The gist of these conversations is that Sadler and Bertini warned O'Hair that the Union would go to any lengths to preserve its position, including picketing at the homes of corporate officers, and twisting the words used by management officials to serve the Union's purpose. According to O'Hair, he had these warnings in mind when he spoke to Abate and exercised caution in the words he used and tried to get off the phone as quickly as possible.

O'Hair recalled that Abate introduced himself and "immediately" asked if O'Hair was going to consider hiring all of Pritchard's employees. O'Hair said no, that he would consider each person individually. According to O'Hair, Abate next wanted to set up a group interview to discuss hiring these employees because they had been working there for so long. O'Hair admittedly interrupted Abate and told him that he had a procedure in place and that he was not going to hire anybody through the Union. He told Abate he was interested in individuals, not groups of people. O'Hair testified that he told Abate the procedure was for individuals to fill out an application and leave it at the front desk and that he would call people that were qualified for interviews. O'Hair further recalled Abate mentioning group interviews again with O'Hair responding, "absolutely not, I'm not going to give a group interview." O'Hair specifically denied telling Abate that he was not going to hire any union or Pritchard employees. O'Hair also did not remember saying anything about the work performance of Pritchard's employees.

Considering the testimony and the demeanor of the witnesses, in the context of the other evidence in the record, I find that Abate's recollection of events is more credible, to the extent there are any discrepancies. Abate, although employed by another Union, no longer has any interest in the outcome of this proceeding. Moreover, although the Respondent's counsel endeavored to show inconsistencies between his testimony and prior affidavit, I find the testimony remarkably consistent, considering the passage of time. In contrast, O'Hair, testifying as one of the last witnesses in the hearing after having listened to the testimony of all the other witnesses as the Respondent's designated representative under the sequestration ruling, had ample time to conform his responses to the evidence that preceded it. There was no affidavit or other written documentation of this conversation, contemporaneous with the event, to compare his testimony to. In addition, Bertini and Sadler did not fully corroborate O'Hair's testimony regarding the "heads-up" he received from them. Finally, Abate's testimony that O'Hair said he was not interested in meeting with a group of Union workers is not much different from O'Hair's admission that he told Abate that he was not going to hire anybody through the Union and

[10] One of the conversations he described with Bertini could not have occurred before January 8. O'Hair testified that Bertini used a profanity in referring to the tactics the Union was using at the Respondent's facility. In reality, the Union did not engage in any conduct directed at the Respondent until after this conversation.

would not hold group interviews. Whether these statements indicate union animus will be discussed later.

The Union held at least one meeting with Pritchard's employees after this telephone conversation.[11] Abate testified that the purpose of the meeting he described was to let the employees know how O'Hair felt and what position they were in. Maran testified that the Union held these meetings to, initially, inform the employees of the fact that Pritchard had lost the contract and learn what they already knew about the situation, and later, to have the employees fill out applications so they could be submitted in accordance with O'Hair's description of the process to Abate. There is no dispute that the Respondent did not interfere with the Union's ability to meet with the employees on January 7 and 8.

Abate testified that, at the meeting he described, he relayed to the employees what O'Hair told him. When asked, on cross-examination, what he told the employees regarding his conversation with O'Hair, Abate testified that he told them that O'Hair was not interested in hiring them. Maran testified initially on cross-examination that Abate did not tell the employees about his conversation with O'Hair "in detail" and denied that he told the employees that O'Hair was not interested in hiring them. Later, also during cross-examination, she recalled that Abate did say this at some point, but claimed that she could not recall if he said it at a meeting of employees or in some other context. In any event, according to Maran, Abate's statement was not translated for the Spanish-speaking employees in those words. Maran testified that the message that was conveyed to the employees at these meetings was that, if they wanted to keep their jobs, they would have to file an application. In fact, at the January 8 meeting, the employees were given applications to fill out and plans were made to present the applications to O'Hair as a group the next day.

The overall credibility of Maran's testimony is affected by the same consideration as that of O'Hair. Maran also was present throughout the testimony of General Counsel's witnesses as the designated representative under the sequestration ruling. She thus had ample time and opportunity to conform her answers to the many variations of these meetings and other incidents that had been described by the employee witnesses.[12] I also found her efforts to avoid conceding that Abate might have mischaracterized his conversation with O'Hair to be somewhat disingenuous. I find, as with the remainder of his testimony, that Abate was credible and candid in acknowledging that he essentially provided the employees with his interpretation of what O'Hair told him, i.e., that he wasn't interested in hiring them. Whether this influenced how employees perceived their later encounters with O'Hair will be discussed shortly.

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[11] Abate testified about only one meeting, on the evening of January 8, in the conference room off the lobby at the Respondent's facility. Rebecca Maran, the Union's organizer with primary responsibility for the campaign at issue here, testified that there were actually two meetings on January 7, at about 4:00 PM and 8:30 PM, before Abate's conversation with O'Hair, and two meetings on January 8, at about the same times. She recalled that Abate attended all but the last meeting. The employees who were asked about these meetings focused on the meeting or meetings that occurred on January 8.

[12] While some employees recalled hearing that the Respondent, or O'Hair, did not want to hire them because of the Union, others did not. As could be expected, the employees' recollections were not very clear as to the specifics regarding from whom or when they heard such statements. Because most of the employees had limited facility with English, any statements they heard would have been filtered through the translation of other employees or Union officials.

It was also at these meetings, on January 7 or 8, that the Union learned that some employees, such as Nelson, had already submitted applications to the Respondent and that one employee, Alberto (a/k/a Luis) Diaz had already been offered a supervisory position by the Respondent.

Abate and Maran testified that they returned to the Respondent's facility on January 9 in order to implement the strategy agreed to at the employee meetings of presenting the employees' applications as a group. Abate referred to this, in his testimony and pre-trial affidavit, as a "march on the boss", a tactic often utilized by unions as a way of demonstrating employee solidarity. After meeting a group of 5 or 6 employees in the cafeteria, they proceeded to O'Hair's office, which is on the second floor, across from the basketball court. O'Hair was not in his office. Maran and Abate testified that they waited for some time, either 10 minutes or 45 minutes, respectively, and left when O'Hair did not appear. Maran returned to the facility the next day, this time alone, to try again to present the applications that had been collected from the employees. [13] This time, O'Hair was present. Maran and several employees testified about this incident for the General Counsel.[14] There were almost as many variations as there were witnesses. O'Hair was the only witness to testify about this incident for the Respondent. The Respondent suggests, in its brief, that it is not necessary to make any credibility resolutions regarding the "march on the boss" in order to reach a decision in this case. The Respondent argues, alternatively, that the testimony of the General Counsel's witnesses should not be credited because their recollection of the event was colored by "psychological pre-conditioning" by the Union.

Maran testified that she had the applications in a purple folder and that she gave the folder to Carmen Garcia as they were walking toward O'Hair's office. She recalled that Garcia in turn gave the folder to Tobon, who was the Union's steward at this facility. Maran recalled further that, as the group approached O'Hair's office, they were met by a man whom the employees told her was O'Hair. According to Maran, Garcia and Tobon were at the front of the group. She recalled that Tobon spoke first, in Spanish, and then Garcia said, in English, "we're here as a group, we want to give you our applications, we really need our jobs here." Maran testified that O'Hair walked past Tobon and Garcia and approached her. At this point, he was standing in the middle of the group. Maran recalled O'Hair saying to her, "I already talked to your boss. I don't want to deal with the Union.[15] I don't want to take these applications. I don't want a bunch of applications from the Union. I don't want to hire a bunch of Union workers because I don't want a union in this building."[16] Maran testified that she said thank you and then, as O'Hair was walking away, asked him if she could translate what he just said for the workers. Maran then translated O'Hair's comments into Spanish. The group then walked toward

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[13] Again, the Union encountered no interference in meeting with the employees in the cafeteria on January 9 and 10.

[14] Maran testified that Adrian Caicedo, Carmen Garcia, Kathleen Nelson, Gabriella Ortiz and Jose Tobon participated in the march on the boss. Only Nelson is a native English speaker. Garcia appeared to have the most proficiency in English of the remaining employees, all of whom testified with the aid of an interpreter.

[15] In her pre-trial affidavit, prepared shortly after these events, Maran stated that O'Hair said he "did not want to *talk* to the Union." In all other respects, her testimony at the hearing was consistent with her affidavit in describing this encounter with O'Hair.

[16] In leaflets she prepared shortly after this incident for use in rallying support for the Union's cause, she reported O'Hair's statement using these same words. One of the leaflets, quoting O'Hair as saying he didn't want to hire a bunch of union workers, was distributed on January 14, before any charges were filed.

the elevators to go downstairs to the lobby. Maran testified that as they were waiting for the elevator, O'Hair called her over. She went to O'Hair with Tobon. O'Hair said that if the Union was going to have meetings like this, they should talk to Pritchard, that it would be different if they were employees of the Respondent. Maran responded that the Union had already communicated with Pritchard and had no problem with that. At that point, according to Maran, the group went back down to the lobby and gave the folder with the applications to the receptionist, Carmen Colon, asking her for a receipt. The receipt lists the eight employees whose applications were in the folder.[17]

Tobon testified that he introduced himself to O'Hair as the Union's steward and said that he was there to give O'Hair the applications on behalf of himself and his co-workers. According to Tobon, he was speaking Spanish with Carmen Garcia translating.[18] Tobon testified that O'Hair responded, in English, "don't give them to me, give them to the receptionist on the first floor." Tobon testified further, consistent with Maran, that O'Hair called him and Maran back as they were leaving. Tobon's recollection of what O'Hair said to him and Maran is that he "did not want us because we were with the Union." Although O'Hair said this in English, Tobon testified that he understood what was said and, to demonstrate his understanding, he repeated the same statement in English on the witness stand. Finally, Tobon testified that Maran translated O'Hair's statement into Spanish for the other employees.

Garcia's recollection was significantly different. She recalled that she was the one with the applications in hand and that she served as the employees' spokesmen, without the aid of a translator. She initially testified that Tobon played no role during this incident. After being asked three times by the General Counsel whether Tobon said anything, Garcia finally said that, if he did say anything, she could not now recall it. Garcia contradicted herself by initially claiming that she could not recall whether Tobon said anything because everybody was speaking at once only to testify later that only one person spoke to O'Hair. According to Garcia, O'Hair's response to whoever it was that tried to give him the applications was that he was not going to hire them because they had a union. On cross-examination, Garcia did corroborate Maran's and Tobon's testimony that O'Hair called Maran back as they waited for the elevator. She testified that she heard O'Hair tell Maran: "Remember, I don't want a union in the building."

Ortiz, testifying through a translator, recalled that O'Hair refused to accept the applications from Maran, saying he did not want them because he did not want the Union, that he had problems with the Union. Ortiz testified that she understood a little of what O'Hair was saying, but she acknowledged that others, including Garcia and Tobon, translated parts she didn't understand. Nelson, who is English-speaking, recalled Maran trying to give O'Hair the applications and O'Hair refusing them, saying that he was not going to hire a bunch of union employees. Nelson also recalled O'Hair telling Maran to take the applications downstairs to Carmen and he would get them from her and would interview the employees individually. Nelson testified that she did not hear O'Hair say he did not want the Union in the building and that she did not hear him say he was not going to give group interviews. Although Nelson acknowledged attending meetings with union staff members before this incident, she denied being told anything about Abate's phone conversation with O'Hair and denied hearing anyone say that O'Hair did not want to hire them before she heard O'Hair say this. Caicedo testified on

[17] The eight applications were those of: Carmen Garcia, Santiago Restrepo, Jose Tobon, Ivan Sanchez, Gustavo Sanchez, Fabiano Filigrana, Eleazar Mendoza and Gabriela Ortiz.

[18] In his pre-trial affidavit, Tobon stated that Maran translated for him. At the hearing, he explained the discrepancy by testifying that Garcia began translating but that Maran took over when Garcia had trouble doing so.

direct exam that he was present for both attempts to hand-deliver the applications to O'Hair. He recalled that, on the second attempt, when the group encountered O'Hair, O'Hair refused to accept the applications, saying "we worked for the Union, that he didn't like that and that we weren't going to work there anymore." Caicedo, while acknowledging that he does not speak English very well, testified that he was able to understand what O'Hair was saying. On cross-examination, Caicedo acknowledged attending meetings with Maran and other Union representatives before this incident and recalled being told that the employees were going to lose their jobs, that the Respondent was going to get them out of there. Caicedo also testified that he didn't need to be told this by anyone because it was obvious to him, when he saw that the Respondent was advertising their jobs in the paper, that the Respondent did not want them. This was an eminently logical conclusion for anyone to have drawn.[19]

O'Hair testified that he was confronted by a group of people within three steps of leaving his office. He recognized only a couple of them. He recalled that several people started talking at the same time, most of them in Spanish. He focused on Maran because she introduced herself and was speaking English. O'Hair had not met Maran before. According to O'Hair, Maran was holding a blue folder, which she tried to give him as she spoke. After introducing herself, Maran said she wanted to present him with applications of a group of people the Union represents. O'Hair recalled putting up his hand, in a "stop" gesture, saying he had just talked to her boss yesterday, at which point Maran corrected him by saying that the man he spoke to was not her boss. O'Hair then said that he had already told the gentleman from the Union that he spoke to that he would not accept applications from the Union. O'Hair continued by telling Maran that he would accept applications from individuals, that everybody had the same right as anyone coming off the street to apply for a job. He told Maran that the applications had to be left at the front desk. O'Hair then turned to walk away. As he did so, he saw Maran turn toward the group that was with her and start to speak in Spanish. O'Hair then asked Maran if she was telling them what he said and she said or gestured that she was. According to O'Hair, he eventually received the blue folder containing several applications from the front desk. O'Hair specifically denied saying to Maran and the group that he wasn't going to hire union employees or a "bunch of union employees". O'Hair also claimed that, as with his conversation with Abate, he was mindful of Sadler's and Bertini's warnings about the Union's tactics and was intent on extricating himself from the situation as quickly as possible.

While there are almost as many variations as there were witnesses regarding the "march on the boss", there is no dispute that O'Hair rebuffed the Union's attempt to submit applications for employment in the Respondent's new in-house janitorial and housekeeping department on behalf of the employees as a group, and that O'Hair told Maran that he would not accept applications from the Union. While it is also undisputed that O'Hair told Maran and the employees who were with her that they could submit the applications at the front desk, and that he would interview employees individually, the evidence in the record establishes that the Respondent had already filled almost all of the positions in its new housekeeping and janitorial department. What is in dispute is whether O'Hair explicitly stated that he did not want to hire the employees because of their Union affiliation, as Maran and several employees claimed and

[19] The Respondent succeeded during cross-examination in confusing Caicedo so much that he ended up testifying that he was not even present for the second attempt when the group met O'Hair. Nevertheless, despite Respondent's efforts to confuse Caicedo, I found him to be an honest, straightforward witness. Although he may not have recalled with clarity whether he was present or not, other witnesses confirmed that he was present during the "march on the boss" and his recollection is generally consistent with the tenor of the encounter described by Maran and the employee witnesses.

O'Hair denied.

The variations in the witnesses' testimony regarding this incident is understandable when one considers the passage of time and the effect of individuals' background and perspective on how they view any given situation. I do not subscribe to the Respondent's theory of "psychological pre-conditioning". The employees who were there with their Union representative did not need to be told by anyone that the Respondent was not interested in hiring them. As Caicedo said, it would have been obvious to anyone seeing the ad in the previous Sunday's newspaper that the Respondent had no interest in hiring the employees currently performing the housekeeping and janitorial work at the YMCA. If it had such an interest, one would expect that the Respondent would have let these employees know about the availability of the new jobs directly. Similarly, the employees did not have to be told by anyone that O'Hair did not want to hire them because of their affiliation with the Union because his admitted gestures and statement, i.e. refusing to accept applications proffered by their union representative while saying he would not accept applications from the Union, would reasonably lead them to that conclusion. Although I am not convinced that O'Hair said, in heac verba, "I do not want to hire a bunch of union employees", I find that he clearly conveyed this impression to Maran and the employees by his words and gestures. His response to the "march on the boss" must also be viewed in the context of the Respondent's efforts, to be detailed infra, to fill as many positions as possible before the ad even appeared in the paper.

I also find, based on Maran's testimony, corroborated by Garcia, that O'Hair told Maran that he didn't want "a" or "the" Union in the building. The fact that Maran included this statement in a leaflet prepared shortly after the incident rebuts any suggestion that she fabricated the testimony to support the allegations in the complaint. Although Garcia's testimony was not always reliable, her recollection as to this statement appeared to be genuine. Finally, the statement, which was not specifically denied by O'Hair, is consistent with the subsequent attempts of the Respondent, and O'Hair in particular, to keep the union, as represented by Maran, "out of the building". As will be discussed in the next section of this decision, these attempts were in marked contrast to the Union's previous ease of access to the facility.

The complaint specifically alleges that the Respondent violated Section 8(a)(1) of the Act during this incident by O'Hair informing employees that they would not be hired because of their union membership. Because of the conflicting evidence as to what O'Hair said, I find that the General Counsel has not met his burden of proof and shall recommend dismissal of the complaint as to this allegation. I will, however, consider the evidence regarding O'Hair's statements and conduct during the march on the boss, and the inferences to be drawn from such evidence, on the issue of animus.

C. *The Respondent's Alleged Interference with the Union's Access to the Employees*

Although Pritchard's collective-bargaining agreement with the Union did not contain a specific provision regarding union access at the worksite, the testimony of Bertini, Abate, Maran and others establishes that there was a practice of allowing the Union to meet with employees at their work locations during non-working times. Under this practice, the Union merely had to inform Pritchard that it was going to be meeting with the employees. There was no requirement of notification to the owner of the facility, such as the Respondent. It is also apparent that the Union had regularly met with Pritchard's employees in the Respondent's cafeteria, which admittedly is open to the public during the day when the Respondent's facilities are open. It is also undisputed that the cafeteria and adjacent lounge area were open to employees working inside the facility, including Pritchard employees, even after it closed for the day, around 2:30

PM. There is also evidence that, in response to complaints from O'Hair about Pritchard employees seen lounging in Pritchard's office in the basement, Bertini told the employees that they were supposed to take their breaks in the cafeteria. As previously noted, the Respondent did not interfere with the Union's meetings with the employees on January 7 and 8, in the conference room off the lobby, when the Union first informed the employees of the Respondent's plans to terminate its contract with Pritchard or with its meetings with employees in the cafeteria before the two attempts to deliver their applications to O'Hair.

The Respondent's attitude toward the Union's access changed significantly after the January 10 "march on the boss". Thus, O'Hair made a point of telling Maran that the Union was not welcome in the building and that, if she was going to have meetings like this in the future, to let Pritchard know. According to Maran, O'Hair said it would be different if they were employees of the Respondent. Since the Union had already been following this practice, Maran told O'Hair she did not have a problem with that. The next time that Maran attempted to meet with employees in the building, on January 14, she encountered her first resistance from the Respondent.

On January 14, Maran went to the Respondent's facility to meet with the day shift employees. She arrived at the facility around noon and met the three housekeepers, Garcia, Nelson and Ortiz, in the cafeteria. Garcia, Nelson and Ortiz were on their lunch break. Maran and the three employees went from the cafeteria to the lobby and began leafleting near the main entrance. The leaflets were intended to inform the public, including members of the YMCA arriving to use the facilities, about the Respondent's termination of its contract with Pritchard and the impact on the employees represented by the Union. After about 5-10 minutes, O'Hair approached the group and told them they could not leaflet in the building. He told them if they wanted to hand out leaflets, they had to go outside. Because it was very cold outside, the employees chose to stop leafleting and return to the cafeteria. Maran left the building.[20] There is no evidence that Maran and the three employees blocked ingress or egress to the facility or were otherwise disruptive.

Maran returned to the Respondent's facility that evening, around 9:30-10:00 PM to meet with the night shift employees. She approached the employee at the front desk, who was identified for the record as Rick Oney.[21] Oney told her that she could not be in the building and could not meet with the employees. According to Maran, he also told her that if any employees did speak to her in the building, they would be thrown out. Maran testified that she waited in the lobby for Reese Dinkins and Eleazar Mendoza to arrive for work.[22] While she was waiting, Dinkins arrived for work and greeted her. As she approached him, Maran heard Oney tell Dinkins that he shouldn't talk to her. Maran asked Dinkins to meet her outside and left the building. After speaking to Dinkins, she asked him to tell steward Jose Tobon to meet her outside and Dinkins said he would. Dinkins then went back into the building to punch in. Maran testified that, as she was leaving the building, she saw Hartford police arrive. She told them she was leaving and nothing further occurred that night. Maran specifically denied trying to re-enter the building the same night.

Dinkins substantially corroborated Maran's testimony. According to Dinkins, he saw

[20] The testimony of Maran and the three employees is mutually corroborative regarding this incident.

[21] According to Maran, the usual practice for union representatives to meet with employees during off-hours was to go to the front desk and have the employee paged.

[22] Dinkins worked from 10:00 PM to 2:00 AM and Mendoza from 10:30 PM to 3:30 AM.

Maran standing outside the building as he arrived for work. Dinkins testified that Maran accompanied him into the building. Dinkins was going to talk to Maran after he punched in. Dinkins testified that Oney stopped him and said if Dinkins spoke to Maran on Y property that Oney would have to take his keys and send him home and that, if Maran was on Y property, Oney would have her arrested. Dinkins testified further that before this incident, Maran would come into the building to talk to the night crew "all the time" without incident. In fact, Dinkins had attended a meeting in the conference room with Maran and other union staff earlier in January and had filled out his application there.

Oney was called to testify by the General Counsel as a hostile witness under Rule 611(c) of the Federal Rules of Evidence. Oney identified himself as the "front desk clerk". He was still working for the Respondent at the time of the hearing and claimed to have retained Respondent's counsel as his lawyer before the hearing. Oney worked from 3:30 – 11:00 PM in January and reported to Rachel Soucy, the Respondent's Residence Director. He described his duties as answering phones, taking in cash for the various departments, such as payments for rooms, renting out rooms and handling security in the lobby. The Respondent also had a security guard, Willie Sampson, working in the evenings. According to Oney, after 9:00 PM, he and Sampson were the only employees of the Respondent in the building along with the Pritchard night crew. Oney conceded that while he can consult with his manager by phone, he is authorized to handle certain security functions, including calling police if someone not authorized to be in the building refuses to leave upon request.

Oney testified that O'Hair had spoken to him on January 14 about the Union's leafleting in the lobby. He recalled O'Hair telling him that the Union had posted leaflets in the building and blocked people entering and leaving the building.[23] O'Hair told Oney that union representatives were not allowed in the building because of what happened earlier that day. Oney at first testified that he saw Maran attempt to enter the building a couple times that night but later conceded that he might have confused January 14 with a later date. He did recall Maran approaching the front desk and asking him to page somebody. Oney testified that he did not page the person she requested, instead telling her that she wasn't supposed to be in the building. When Maran started to say something, Oney cut her off, repeating that she was not supposed to be in the building. Oney told her this was because of something that happened earlier that day. He admittedly told Maran that if she did not leave the building, he would call the police. Maran then left.

Oney testified further that Dinkins came to the front desk after Maran left and Maran came back into the building, apparently to speak to Dinkins. According to Oney, he told Maran again that she had to leave and he told Dinkins to be careful not to hand out leaflets, that he could get in trouble. Oney claimed that he said this to Dinkins because the Respondent had a policy prohibiting the handing out of flyers without approval. When pressed as to the origin of this policy, Oney claimed he learned of it by "word of mouth". The Respondent did not offer any evidence that such a policy in fact existed before the union issue arose in January. Oney testified further that he also told Dinkins that if he wanted to speak to Maran, he had to go outside. On further questioning, Oney conceded that he may have said that Dinkins could be sent home if he leafleted. This is consistent with what Oney had stated previously in an affidavit, i.e., that he told Dinkins that he could not hand out or post leaflets or Oney would have to send him home. Oney testified that he did call the police the night of the Dinkins incident but he recalled that no employees were around when the police arrived.

[23] The Respondent offered no evidence to support these claims.

Oney did not impress me as a candid or reliable witness. It was apparent that he endeavored to shade his answers in the light most favorable to his employer. Moreover, despite the apparent conflict of interest, Oney claimed to have voluntarily chosen to retain legal counsel from the same attorneys representing his employer.[24] I find that Oney's earlier statement in his affidavit is a more reliable account of what he said to Dinkins on January 14. Although I have previously noted some reservations about Maran's testimony, I credit her with regard to this incident because she was corroborated by Dinkins, whom I found to be very credible with respect to this incident. Accordingly, I find that, on January 14, Oney did tell Dinkins that he would be sent home if he spoke to Maran on the Respondent's property or handed out leaflets in support of the Union.

Maran testified that she returned to the YMCA the next day, January 15, around 5:00 PM, to leaflet. She was joined on this occasion by Tobon and Santiago Restrepo, both of whom worked on the night crew and were off-duty at the time. This time, Maran and the employees remained outside the building, handing out flyers on the sidewalk leading to the main entrance. After about 15 minutes, the police arrived and told them they had to move because they were still on the Respondent's property. Maran, Tobon and Restrepo complied with this request and continued leafleting from the public sidewalk. Tobon and Restrepo corroborated Maran's testimony regarding this incident.

On January 21, Maran again went to the Respondent's facility to meet with the Pritchard employees. She first met with the day shift employees around noontime, in the cafeteria. The three housekeepers and Tobon were present. Maran testified that, while they were meeting, two Hartford police officers arrived. One approached Maran and told her that she could not be there because it was private property. When she identified herself as the employees' union representative, they left. Garcia described the incident in essentially the same way as Maran. Ortiz, Tobon and Nelson recalled that when the police came, they took Maran with them. It is not clear whether they meant to say that Maran was arrested, which she was not at that time, or that they recalled Maran leaving with the policeman to explain her reason for being in the cafeteria at that time. In any event, there is no dispute that the police did arrive and question Maran in the presence of employees during a meeting that was being held at the same time and in the same place that the Union had historically conducted such meetings. There is also no dispute that the Respondent's cafeteria is open to the public at that time of day.

Maran returned to the Respondent's facility on the night of January 21, to meet with the night crew, sometime between 8:00 and 8:30 PM. According to Maran, she saw Oney at the front desk and he appeared to wave her toward the cafeteria where the Pritchard employees were already gathered. She identified Tobon, Fabiano Filigrana, and Aldemar Sanchez as being present. [25] As she was talking to the employees in the back of the cafeteria, she saw two policemen enter from the front of the cafeteria. They told Maran to come with them. According to Maran, as she accompanied the officers, the employees followed. When they got to the lobby, she explained to the officers who she was and why she was there. She also described the incident earlier that day when the officers left after she gave the same explanation. At that point, according to Maran, the police officers went to the front desk and had a conversation with Oney. During this conversation, she saw Oney make a telephone call and saw one of the officers speaking on the phone. After this call, she heard one officer say to the other, "we'll have to

[24] In this regard, it must be noted that the Respondent was taking the position that Oney was neither a supervisor nor its agent.

[25] Aldemar Sanchez is not alleged to be a discriminatee and did not testify in this proceeding.

arrest her." The police officers then approached Maran, who had been observing this while seated in the lobby, and made the arrest. According to Maran, Tobon and the other employees were present when this occurred. Maran testified that, upon being released by the police after being booked, she returned to the facility and asked Oney to call Tobon, who was working, to let him know that she was alright.

Tobon, while professing not to remember dates and details very well, did recall being at a meeting with Maran in the cafeteria at night with other Pritchard employees during which the Respondent's security guard and then the police arrived and told them they could not have a meeting there. He recalled seeing the police take Maran's car keys from her and saw her leave with them. He did not know where they took her. Filigrana had a very poor memory regarding meetings with the Union but he did recall being at a meeting in the cafeteria with the lady from the Union when the security guard and the police came and told them to leave. Filigrana did not describe seeing Maran arrested. He recalled that the group simply agreed to leave the cafeteria and hold the meeting at the Union's office. Santiago Restrepo, who was working that night, testified that he was working and could not go to the meeting when it started. He did go to the cafeteria later but the meeting was over. He testified that Tobon told him that Maran had been arrested.[26]

Oney also testified about this incident. According to Oney, he saw Maran walk past him toward the cafeteria without stopping. Oney asked the security guard, Sampson, to go get her. Sampson returned to the front desk with Maran. Oney told her, again, that she was not supposed to be on the Respondent's property. According to Oney, Maran said that she had a right to be there, that the employees had a right to talk to her and she returned to the cafeteria. At that point, Oney called O'Hair, told him that the Union was back on the property and asked O'Hair if anything had been worked out. Oney testified that O'Hair said nothing had been worked out, that the Union was still not supposed to be in the building. When Oney asked O'Hair what he should do, O'Hair asked Oney what would he normally do if someone was on the property who wasn't supposed to be and refused a request to leave. Oney told O'Hair that if somebody had already been warned not to be on the property, he would have them arrested. According to Oney, O'Hair then said, "do what you would normally do." Oney then called the police and had Maran arrested.

Oney described a scene similar to that described by Maran, i.e., the police brought Maran out to the lobby, spoke to her separately and then spoke to him, asking Oney what he wanted them to do. Oney admitted telling the police to arrest Maran. Oney also corroborated Maran's testimony that Maran returned to the facility later that night and asked him to page one of the Pritchard employees. Oney disputed Maran's testimony that there were employees in the lobby during Maran's arrest. It is undisputed that Maran was not handcuffed but walked out on her own power with the police.

To the extent there is any discrepancy between the testimony of Maran and the employee witnesses and that of Oney, I credit the General Counsel's witnesses. Tobon and

[26] Although Restrepo's testimony is hearsay, the Board has considered hearsay evidence when it is otherwise probative and supported by other substantially corroborative evidence. *Dauman Pallet, Inc.,* 314 NLRB 185, 186 (1994). In this case, Restrepo' testimony is supported by that of Tobon that he saw the police take Maran's car keys and escort her out of the building. In addition, there is no factual dispute that Maran was arrested that night. The only factual dispute is whether any employees witnessed the arrest and Restrepo's testimony is probative of that.

Filigrana recalled seeing both a security guard and the police come into the cafeteria, which is consistent with Oney's testimony that he first sent Sampson into the cafeteria to get Maran and, when she wouldn't leave, called the police who escorted her from the cafeteria. Tobon corroborated Maran's testimony about the police taking her car keys away, something that happened in the lobby as part of the arrest. Thus, I discredit Oney's testimony that no employees were present when Maran was arrested. In any event, even if there were no employees in the lobby during the actual arrest, there is no dispute that employees were present both at noon and during the evening meeting when the police approached Maran and questioned her presence in the cafeteria.

The Respondent attempted to show, through its witnesses, that the Respondent's facility had a practice of limiting access to residents, members and employees and "unique security concerns" because of the transient nature of the people who reside there. I do not doubt that the Respondent's front desk personnel, like Oney and Carmen Colon, are expected to be vigilant and question anyone they don't recognize as having a reason to be in the facility. The testimony of Colon and Oney that they can and have called the police to arrest strangers who refuse to leave is credible.[27] However, there is also no dispute that the cafeteria, while open to the public only until 2:30 in the afternoon, is open to employees of the Respondent and Pritchard for the purpose of taking their breaks in the evenings. Colon testified candidly that, to her knowledge, Pritchard's employees who worked at the Respondent's facility were permitted to have visitors during their breaks and could use the cafeteria and adjacent lounge area and vending machines even after hours. As previously noted, there had never been a problem with union staff meeting Pritchard employees at the Respondent's facility during their breaks before the "march on the boss." Thus, it is apparent that, in deciding to enforce its property rights against Maran beginning on January 14, the Respondent was not as much concerned with the security of its members and residents as it was with the Union's activities as an advocate for Pritchard's employees.

The Respondent's discriminatory motive in limiting the Union's access to Pritchard's employees is further evidenced by the credible testimony of Sadler and Bertini regarding telephone conversations they had with O'Hair after the Union began leafleting at the facility. Sadler testified, without dispute, that O'Hair called him in January to complain about the union activity taking place in the lobby. O'Hair asked Sadler if he had any control over removing the union representatives from the lobby and the building. Sadler testified that he told O'Hair that he would speak to his employees to make sure they restricted their union activities to their break time. Similarly, Bertini testified, without contradiction, that O'Hair called him in mid-January and said he wanted the Union representatives out of the building.[28] Bertini told O'Hair that he could not control the Union's access to the employees. O'Hair told Bertini that he would look into the matter. According to Bertini, O'Hair contacted him later and said that the YMCA was not a public facility, but a members-only facility. O'Hair told Bertini that if union members wanted to have a meeting, they would have to have it outside. According to Bertini, O'Hair told him that the Respondent's Executive Director, Kenard, is the one who explained this policy to him.

Several allegations in the complaint are based on the above incidents. Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act on January 14 by implementing a no solicitation/distribution rule because employees engaged in union activities.

[27] Maran, of course, is not a stranger to Oney and Colon. Oney in particular knew who she was and why she was there.

[28] This is consistent with O'Hair's statement to Maran on January 10 that he didn't want the Union in the building.

This allegation is based on O'Hair's telling Maran and the three housekeepers around noontime that they could not hand out leaflets in the lobby and Oney telling Dinkins later the same night that he would be sent home if he handed out or posted leaflets. The General Counsel also relies on the January 15 incident when the police prevented Maran, Tobon and Restrepo from leafleting on the sidewalk immediately outside the main entrance to the Respondent's facility. The Respondent does not dispute that these incidents occurred as described by the General Counsel's witnesses but argues that it was merely enforcing its private property rights.

The Board has held that employer rules that prohibit employee solicitation or distribution in non-working areas during non-working times are overly broad and unlawful. See *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Our Way, Inc.* 268 NLRB 394 (1983). See also *Nashville Plastic Products,* 313 NLRB 462 (1993). There is no dispute here that Garcia, Ortiz and Nelson were on break and that Tobon and Restrepo were off-duty when they were prevented from leafleting in the lobby and on the sidewalk adjacent to the entrance, which were non-work areas. It is also undisputed that Dinkins had not started his shift when Oney told him he could not hand out or post leaflets. This also occurred in the lobby. The Respondent offered no evidence of the existence of a valid no-solicitation/distribution rule covering the lobby or walkway prior to the onset of protected activity. The Respondent also offered no evidence to show that the solicitation and distribution engaged in by the Pritchard employees was disruptive, or otherwise interfered with its ability to maintain discipline or productivity. Thus, the prohibition was unlawful on its face. In addition, I find the promulgation of the rule unlawful because the Respondent announced these restrictions in response to the Pritchard employees' protected union activity and in the absence of any evidence that the solicitation and distribution interfered with productivity or discipline, or otherwise satisfied a legitimate business justification. See *Horton Automatics,* 289 NLRB 405, 409 (1988) and cases cited therein. Accord: *Capital EMI Music, Inc.,* 311 NLRB 997, 1006 (1993).

The fact that the rule was directed at employees of a contractor, rather than the Respondent's own employees, does not render the Respondent's conduct lawful. While it is true that the Board and the courts make a substantive distinction between the "rights of employees who are rightfully on the employer's property pursuant to the employment relationship and nonemployee union organizers, and [apply] distinctly different rules of law … to each", the Board and the courts have held that employees who regularly and exclusively work on the premises of an employer other than their own are not "strangers to the property" but are entitled to the same rights of solicitation and distribution as the employer's direct employees. *Gayfers Department Store,* 324 NLRB 1246, 1249-1250 (1997). Thus, whatever rights the Respondent may have had to limit Maran's and other non-employee union representatives' access to its facility under the Supreme Court's decision in *Lechmere*[29] did not extend to Pritchard's employees who were regularly and exclusively working at the Respondent's facility. Accordingly, I find, as alleged in the complaint, that the Respondent violated Section 8(a)(1) of the Act on January 14 when it prohibited Pritchard employees from engaging in protected solicitation and distribution during non-work times and in non-work areas. *Gayfers Department Store,* supra; *Nashville Plastic Products,* supra. Accord: *New York New York Hotel & Casino,* 334 NLRB 762 (2001).[30]

The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act when Oney told Dinkins that he would be sent home if he handed out or posted leaflets or talked to Maran on the Respondent's property and that he would have Maran arrested if she did not

[29] *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).

[30] I reject the Respondent's argument that its lobby and entrance were work areas for the reasons the Board rejected similar arguments in *New York New York Hotel & Casino,* supra.

leave the building. I have already found above, based on Dinkin's credited testimony and Oney's admissions in his pre-trial affidavit, that Oney in fact made such threats to Dinkins on January 14. The Respondent argues that nothing Oney said to Dinkins could be viewed as threatening because Oney had no authority over Dinkins. I disagree. It is clear from the evidence that Oney was an agent of the Respondent within the meaning of the Act for purposes of enforcing the Respondent's rules during those periods when he and the security guard were the only staff on duty. Oney acknowledged that he had the authority to call the police if a stranger did not comply with his warnings to leave the premises. He even told Dinkin's that he would do this if Maran did not leave. Moreover, it was Oney who told Dinkin's that he could not talk to Maran inside the building. I find that the Respondent had placed Oney in a position and given him sufficient authority that an employee like Dinkins could reasonably believe that he was speaking and acting on behalf of the Respondent when he made those threatening remarks on January 14. *Hausner Hard Chrome of Ky., Inc.,* 326 NLRB 426, 428 (1998). Accordingly, I find that the Respondent violated Section 8(a)(1) on January 14 through Oney's threats to Dinkins.

Finally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act on January 14 by denying Maran access to the facility to meet with Pritchard's employees and, on January 21, by threatening to and causing the arrest of Maran for meeting with Pritchard's employees on its premises. It is essentially undisputed that the Respondent denied Maran access to its facility after January 10, and that it threatened to have her arrested and carried out that threat when she nevertheless gained access and met with employees in the cafeteria on January 21. The Respondent argues that its actions were lawful under the Supreme Court's *Lechmere* decision because Maran was a non-employee organizer with no right to trespass on its property. The General Counsel argues that Maran had a right of access under the balancing test applied by the Board in *Holyoke Water Power Co.,* 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied, 477 U.S. 905 (1986). See also, *New Surfside Nursing Home,* 330 NLRB 1146, fn. 1 (2000).

In *CDK Contracting Co.,*[31] the Board held that a union with a contractual right of access to a subcontractor's employees has a right of access to the property where the subcontractor's employees are working, subject to a general contractor's or property owner's reasonable and non-discriminatory rules. The Board harmonized this holding with the Court's *Lechmere* decision by reasoning that, having invited the subcontractor onto its premises, the general contractor had subjected its property rights to the subcontractor's contractual obligations to the Union. See also *Wolgast Corp.,* 334 NLRB 203 (2001); Cf. *Peck/Jones Construction Corp.,* 338 NLRB No. 4 (Sept. 20, 2002). Although the Union's collective-bargaining agreement with Pritchard did not contain a specific access provision, there is no dispute that the parties had, prior to January 2002, a practice of permitting the Union access to the employees it represented at their worksite. The Respondent was aware of this practice and had not interfered with the Union's access to Pritchard's employees until after the march on the boss. Under these circumstances, I find that *Lechmere* and its progeny do not apply to the allegations here.

Moreover, under the *Holyoke Water* balancing test, which still appears to be good law even after *Lechmere*, I find that the Union had a right to meet with Pritchard's employees at their work site to carry out its representational functions. When Maran attempted to gain access to the public areas of the Respondent's facilities to meet with Pritchard's employees, she was not a "non-employee union organizer seeking to organize the Respondent's unrepresented employees." She was the union representative for a unit of employees working by invitation of

[31] 308 NLRB 1117 (1992).

the Respondent on its property. She went to the Respondent's facility to assist the employees in their response to the Respondent's termination of its contract with Pritchard, including assisting them in their efforts to obtain employment with the Respondent. Because these employees worked odd hours and held multiple jobs, the easiest way for the Union to communicate information to them was by meeting them during their breaks and before and after work. Such meetings caused no disruption to the Respondent's business and did not interfere with the employees' performance of the work they were hired to do. As noted above, similar visits by the Union had not been of concern to the Respondent before. I have already found that O'Hair's efforts to bar the Union from the building were discriminatorily motivated. Accordingly, I find, as alleged in the complaint, that the Respondent violated Section 8(a)(1) when it denied Maran access to Pritchard's employee and threatened to and caused her arrest when she tried to meet with the employees.

D. *The Respondent Interviews the Pritchard Employees*

Pritchard employed a staff of approximately 14 employees at the Respondent's facility when the Respondent decided to take over the laundry, housekeeping and janitorial services that Pritchard had been providing. The Respondent hired only one of these employees, Diaz. The amended complaint alleges that twelve Pritchard employees were discriminatorily denied opportunity for employment by the Respondent.[32] Another Pritchard employee, Carlos Ocampo, is not named as a discriminatee and no reason was given at the hearing for this omission. [33] The twelve alleged discriminatees filed applications for employment with the Respondent. Some had filed applications even before the ad appeared in the newspaper on January 6, having heard through word of mouth that the Respondent was hiring for their positions. The rest applied after January 6. As previously noted, eight applications were submitted by Maran as part of the January 10 "march on the boss".

There is no dispute that O'Hair began soliciting applications for positions in the Respondent's internal laundry, janitorial and housekeeping operation soon after the Respondent made the decision to assume control of these functions from Pritchard. O'Hair testified that he spoke to Carmen Colon, the Respondent's front desk employee, and Israel Caro, a fitness instructor, about possible candidates in early to mid-December, 2001 and had actually received applications from several candidates by December 10, 2001. By December 26, 2001, O'Hair was already interviewing applicants and making hiring decisions.[34] As previously noted, and

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[32] Although the complaint initially alleged that the Respondent also discriminated against Aldemar Sanchez, he did not testify in this proceeding and the General Counsel withdrew this allegation at the hearing. Bertini testified that Aldemar Sanchez was on a leave of absence when the Respondent announced its decision but returned to work for a week or two before Pritchard's services ended. Pritchard's payroll records confirm this. The record also reveals that Ivan Sanchez, one of the discriminatees, was hired in September 2001 to replace Aldemar Sanchez during his leave and stopped working at the Respondent's facility when Aldemar Sanchez returned in late January. There is no evidence that Aldemar Sanchez applied for a job with the Respondent.

[33] Bertini identified Ocampo as a working supervisor and also acknowledged that he had some disciplinary issues.

[34] Because the Respondent made the decision to take over the laundry operation first and had notified Pritchard that it would assume this function by January 14, these were the first positions filled. O'Hair hired Caro's best friend and mother to fill these positions. Neither had any experience working in a laundry.

conceded by the Respondent, a majority of the positions were filled before the Respondent's help-wanted ad appeared in the newspaper on January 6. O'Hair admitted that he interviewed no Pritchard employees, other than Diaz, before January 6.

O'Hair interviewed nine of the alleged discriminatees, all of whom testified regarding their interviews. O'Hair also testified regarding these interviews, disputing some of the testimony of the General Counsel's witnesses. For several of the discriminatees, O'Hair utilized the services of Colon and an employee in the Respondent's maintenance department, Jorge Oyola, as a translator. Colon and Oyola also testified regarding the interviews they attended. The complaint alleges that, during some of the interviews, O'Hair made statements that are independently violative of Section 8(a)(1) of the Act. Rather than review the testimony in detail regarding the individual interview process, I will only discuss the material aspects of it and resolve only those conflicts in the testimony necessary to resolution of the case. The remaining three discriminatees were never interviewed and there is a dispute whether the Respondent left messages for them or otherwise attempted to invite them for interviews.

According to the testimony of the General Counsel's witnesses, Adrian Caicedo was the first Pritchard employee, other than Diaz, to be interviewed. Caicedo testified that he got an application and filled it out soon after seeing the Respondent's ad in the newspaper. His application is dated January 8. According to Caicedo, he handed his application to O'Hair personally within a day or two of filling it out. As previously noted, Caicedo was in the group that went to submit their applications to O'Hair on January 9 and 10. His best recollection is that he gave his application to O'Hair after the first attempt when the group did not find O'Hair in his office. Because the Respondent admits receiving an application from Caicedo and because Caicedo's application was not in the group submitted by Maran on January 10, I credit Caicedo's testimony that he submitted it on his own on or about January 10.

Caicedo testified that, on January 11, as he was walking through the lobby, Carmen Colon told him that O'Hair wanted to see him in his office. Caicedo met with O'Hair without a translator.[35] Caicedo testified, in English, that O'Hair was on the phone when he entered the office and asked Caicedo to sit down. O'Hair told Caicedo that he liked his work, that all customers were happy with the way he cleaned his areas and that there was one position available, cleaning carpets at night from 10:00 PM to 6:00 AM, paying $10/hour.[36] According to Caicedo, continuing in English, O'Hair told him the supervisor for this job was not there at the time, but would be there in about a week. O'Hair told Caicedo he would call him for another interview when the supervisor returned. Although Caicedo initially recalled nothing further being said during his interview, he did recall, after his memory was refreshed with a leading question by the General Counsel, that O'Hair did mention the Union. Testifying in Spanish, Caicedo recalled that O'Hair said that he didn't work with unions and that the job wasn't going to have a union, but it would have benefits.[37]

O'Hair disputed calling Caicedo in for an interview. According to O'Hair, it was Caicedo who approached O'Hair many times, asking when he was going to get an interview, until finally O'Hair pulled Caicedo aside in the hallway and told him he was no longer interested in hiring him because Caicedo had been absent for two days and had sent a stranger to work in his place. O'Hair specifically denied ever discussing the Union with Caicedo. Caicedo

[35] Although Caicedo testified with the aid of an interpreter, he appeared to understand and speak a fair amount of English.

[36] Caicedo was working as the day porter for Pritchard.

[37] Caicedo's testimony regarding this statement was consistent on cross-examination.

acknowledged being absent on at least one occasion when he had a friend fill in for him, but denied that O'Hair ever said anything to him about this.

I credit Caicedo's testimony regarding the interview. Despite the Respondent's best efforts to confuse this witness, succeeding on some points, Caicedo's testimony that he submitted his application to O'Hair directly, that Colon told him O'Hair wanted to see him and that O'Hair indicated satisfaction with his work and an interest in hiring him was consistent throughout. I attribute any confusion or doubt regarding other portions of his testimony to the passage of time, the difficulties of testifying through a translator and misunderstandings related to the witness' lack of facility with the English language. I also note that other evidence in the record tends to corroborate Caicedo's version of the interview. For example, Bertini testified that O'Hair liked Caicedo's work. In addition, the Respondent's own evidence establishes that, at the time Caicedo had his interview, the Respondent still had openings for a full-time floor care position at night, as well as two full-time night custodians. The Respondent's evidence also establishes that the Respondent planned to have a floor care supervisor who would work nights supervising the floor care group. O'Hair had already hired Robert Coelln to be the supervisor on December 31, 2001, with a start date of January 14, at the time he interviewed Caicedo. Although Coelln ultimately declined the job, on January 21, the fact that he had been hired and was scheduled to start soon after Caicedo's interview lends credibility to Caicedo' testimony that O'Hair wanted to wait until the supervisor was there to make a decision on hiring Caicedo.

On January 15, O'Hair interviewed the three Pritchard housekeepers, Garcia, Nelson and Ortiz. Nelson had submitted her application on January 5, after overhearing Carmen Colon at the front desk telling someone on the phone to come in and apply because the Respondent was hiring housekeepers. Although O'Hair admitted being pleased with Nelson's work, and even though she had worked at the Respondent's facility since 1995, both as an employee of the Respondent and as a Pritchard employee, O'Hair did not interview her until after she participated in the "march on the boss" and leafleted in the lobby with Maran and the other housekeepers. In fact, by the time he called Nelson in for an interview, O'Hair had already hired two of the three housekeepers he needed.[38]

Nelson testified that Colon called her down from the 11th floor where she was working and told her that O'Hair wanted to meet with her. Colon did not say it was for an interview. When Nelson got to O'Hair's office, he did not have her application in front of him, telling Nelson that he would have to look for it. According to Nelson, O'Hair told her she was doing an excellent job and many people were calling to tell him not to let her go. Nelson remembered O'Hair saying that he was only doing the interviewing, that someone else would do the hiring. He told her that, when he found her application, he would put a note on it recommending that the person doing the hiring consider her because he did not want to lose her. Nelson recalled the interview ending with O'Hair saying he would contact her in two weeks. She testified that O'Hair said nothing about the Union during her interview. On further questioning, Nelson recalled that O'Hair said that, if he were doing the hiring, the only reason he would not consider her was an incident that occurred in November 2001 between her and an employee in the Respondent's membership department. According to Nelson, after she explained what had

[38] The Respondent hired Nilda Tirado and Juana Dominguez for these positions on December 28, 2001 and January 4, respectively. Tirado's application was incomplete, with no employment history furnished. O'Hair testified that she had no housekeeping experience, having worked as an office manager. Both Tirado and Dominguez were friends of Colon, who received referral bonuses from the Respondent when they were hired.

happened, O'Hair indicated that it wouldn't be a problem.[39]

O'Hair testified that he did have Nelson's application in front of him during her interview but that it was incomplete. According to O'Hair, when he asked Nelson about this, she told him that she had filled out the application in a hurry because the Union told her she had to do it. O'Hair claims that Nelson told him she really wasn't interested in working for the Respondent because the Respondent would make too many changes and she would have to work too hard. O'Hair testified that he was interested in hiring Nelson until she said this. Nelson denied telling O'Hair that she wasn't interested in the job and denied the other statements attributed to her by O'Hair. According to Nelson, he never said anything about her application being incomplete.

Considering the other evidence in the record, I find Nelson's testimony far more credible than that of O'Hair. There is no dispute that Nelson was an excellent worker and an asset to the facility. She had already expressed interest in working for the Respondent by being one of the first Pritchard employees to submit an application upon learning, inadvertently, that the Respondent was hiring housekeepers. In fact, she applied even before the Union learned about the Respondent's plans. Her participation in the "march on the boss" and the leafleting before her interview demonstrates her interest in retaining her job. Moreover, even if her application were incomplete, because she failed to list her job duties or her "skills and qualifications", this could not have been a reason for O'Hair not to hire Nelson because O'Hair was already familiar with her work.

The Respondent argues that Nelson should not be believed because it is illogical for O'Hair to have said that he was not doing the hiring when in fact he was. Although such a statement, if made by O'Hair, would be contrary to the facts in evidence, that does not mean he didn't say it. What is apparent to me, after considering all of the evidence regarding O'Hair's interviews of the Pritchard employees, is that he was merely going through the motions to cover himself because the Union had already made an issue of the Respondent's failure to consider the Pritchard employees for hire. Rather than tell Nelson outright that he was not going to hire her, O'Hair conveniently shifted the responsibility for that decision to some unidentified official to whom he would refer her application with a recommendation. Moreover, had O'Hair truly been interested in hiring Nelson, as he professed at the hearing, he would have called her in for an interview as soon as she applied, or even sought her out and solicited her to apply, as he did with Diaz.

Garcia and Ortiz were called down for their interviews on January 15 together.[40] Jorge Oyola, a bi-lingual HVAC technician employed by the Respondent in the maintenance department, who was hired and supervised by O'Hair, accompanied them to O'Hair's office. Ortiz went in first, with Oyola serving as her translator. Ortiz had submitted her application through the Union on January 10, as part of the "march on the boss". Ortiz' version of what was said is obviously a translation by Oyola of what O'Hair said in English. According to Ortiz, O'Hair explained that she was there to be interviewed for "rehire" as a housekeeper. After generally describing the housekeeping position with the Respondent, O'Hair told her that he was not going to give her an answer at that time. O'Hair explained that because Pritchard did not have

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[39] In fact, O'Hair acknowledged that the incident in November played no role in his consideration of Nelson's application. Moreover, it appears from the testimony of Nelson, Bertini and even O'Hair that Nelson was probably provoked by the other employee during the incident.

[40] Although Garcia and Ortiz testified that they were interviewed on January 21, other evidence in the record, including O'Hair's testimony and his January calendar, establishes that these interviews occurred on January 15.

experience working in hotels, it had not been doing a good job and that he intended to run the Y like a hotel. Ortiz recalled that O'Hair said, as translated by Oyola, that he was not going to hire her because she had a union and he didn't want problems with the union. Ortiz testified that she responded that she would leave the Union if he gave her a job because she needed her job. Upon further questioning, Ortiz recalled that O'Hair also said, again via Oyola, that the only thing the Union does is take away your money, it doesn't help the employees. Ortiz recalled that, at the end of the interview, O'Hair said he would let her know in two weeks.

Oyola testified as a witness for the Respondent. Much of his testimony had to be elicited through leading questions by the Respondent's counsel even though he was not a hostile witness. For example, Oyola initially described a conversation with Ortiz before the interview in which she asked for his help in keeping her job. Without any prompting, Oyola recalled that Ortiz expressed concern because she had heard that all, or some, of the Pritchard employees were going to be let go. She told Oyola that she was a good worker and had been there a long time and asked him to speak to O'Hair in her behalf. Respondent's counsel then, through a series of leading questions, pulled out of Oyola a story about how Ortiz told him she knew Garcia was going to be let go because she was a poor worker and that another employee, known to Oyola only as "Jose", was going to be let go because he had been caught doing his laundry while working in the laundry room. I do not credit this portion of Oyola's testimony, which appeared to have been fabricated to bolster the Respondent's claims.

With respect to Ortiz' interview, Oyola also needed much assistance from counsel to tell the story the Respondent sought to prove. When Oyola was permitted to answer open-ended questions, he did not help the Respondent's case. For example, he testified that O'Hair told Ortiz that he was going to give the Pritchard employees "first priority", or a "first consideration", or a "first look" before making any decisions.[41] Oyola did recall the Union coming up in the course of the interview and claimed that Ortiz raised the issue but O'Hair stopped her, saying that he wasn't part of the Union and that was between her and the Union. He specifically denied, in response to leading questions, that O'Hair said he would not hire Ortiz because of the Union, that he didn't want problems with the Union, that the Union was no good, or didn't help people or only took there money.[42]

O'Hair testified that he decided to interview Ortiz and Garcia, despite numerous problems he described having with the quality of their work, because he wanted to find out if there was a reason for the problems and if they could be re-trained to work better. He acknowledged asking Oyola to translate for him with Ortiz. O'Hair testified that after generally discussing the purpose for the interview and the housekeeping position with the respondent, he asked Ortiz about the performance issues. According to O'Hair, Ortiz said she had spoken to Bertini and she would do a better job. Ortiz then brought up the Union and O'Hair stopped her, saying that was between her and the Union. According to O'Hair, there was no further mention

[41] The record evidence establishes that, if O'Hair said this, it wasn't true because he had already completed most of his hiring before he began interviewing the Pritchard employees.

[42] By letter dated April 24, 2003, a copy of which was served upon the other parties, counsel for the Respondent advised me that Oyola had come forward on April 21,2003 and indicated that some of his testimony was not accurate. As described by Respondent's counsel, Oyola would now corroborate the testimony of Ortiz that O'Hair told Ortiz that the "Union does nothing for you but take your money and leave you hanging" and would corroborate her testimony that she told O'Hair that, "if he gave her her job back, she would leave the Union because she needed her job." Even before receiving this letter from the Respondent, I had concluded that Oyola's testimony was not reliable. The information in the letter merely reinforces that view.

of the Union during the interview. O'Hair, in an effort to explain away Oyola's testimony that he told Ortiz that he was going to give the Pritchard employees some kind of priority consideration, claimed that he said that "hiring was now a priority for him" and that he may have said something to the effect that he was trying to interview the Pritchard employees first. Of course, if O'Hair said that during Ortiz' interview, he was not being truthful with her. As previously noted, the Respondent essentially interviewed the Pritchard employees *last,* after filling most of the positions with strangers to the facility. O'Hair's lack of candor with Ortiz during the interview is further evidence convincing me that O'Hair went through these interviews without any intent to hire any of the remaining Pritchard employees. Although Ortiz' testimony was not unimpeachable, when weighed against O'Hair's general untrustworthiness, I choose to accept her version of the interview to the extent there is any conflict in the testimony.

After Ortiz left O'Hair's office, Garcia came in. She testified that she asked Oyola to remain, not as a translator, but as a witness. Garcia speaks and understands English very well and did not need a translator during her interview. According to Garcia, she got her application from Carmen Colon after Colon told her, on January 4, that the Respondent was getting rid of Pritchard and hiring new employees. After completing her application, she turned it into Colon. Garcia filled out another application with the Union, which was included in the group of applications that were submitted on January 10, after the "march on the boss".[43] Garcia recalled that O'Hair gave her back one of the two applications during her interview. She recalled further that O'Hair said he was going to check her application, but that he had received more than 100 applications and would hire the "most necessary, the most important." Garcia testified further, after having her memory refreshed through leading questions, that O'Hair said that he had to give them an interview, that it didn't mean he was going to hire them. Garcia acknowledged that she raised the issue of the Union, telling O'Hair that she was in the Union but sometimes the Union benefits the employees and sometimes it does not. At that point, according to Garcia, O'Hair replied that he didn't want the Union because the Union was not good for anyone, it only wanted to take money from the people.

Oyola recalled even less of Garcia's interview than he did of Ortiz' interview. The Respondent was able to elicit specific denials as to the statements attributed to O'Hair by Garcia. However, Oyola testified without prompting that O'Hair told Garcia, as he had Ortiz, that he was going to give the Pritchard employees first consideration. Significantly, when he gave his affidavit to the Board agent investigating the case, Oyola corroborated Garcia's testimony that O'Hair told her he had to give everybody from Pritchard an interview. At the hearing, Oyola denied that O'Hair said any such thing. Respondent's counsel attempted to show that the Board agent had misconstrued Oyola's statement when drafting the affidavit. Although Oyola had reviewed the affidavit before signing it and had the opportunity to correct such a misinterpretation, he did not do so until the hearing. To the extent that the Respondent relies upon Oyola's testimony to contradict Garcia or to corroborate O'Hair, I find such testimony utterly unreliable.[44]

O'Hair testified very briefly regarding his interview of Garcia. He denied that the subject of the Union came up during the interview. O'Hair also testified that he could not recall discussing Garcia's job performance with her during the interview. According to O'Hair, Garcia's interview was brief. Although Garcia's testimony was not entirely credible, I do credit her

[43] The application in evidence is dated January 4.

[44] Counsel for the Respondent, in his April 24, 2003 letter, also reported that Oyola now says that his testimony regarding Garcia's interview was inaccurate to the extent he denied that O'Hair said that the Union does nothing for you but take your money and leave you hanging.

testimony regarding the interview to the extent that she recalled O'Hair telling her that he had to give the Pritchard employees an opportunity for an interview but that didn't mean he would hire them. This is consistent with Oyola's more reliable pre-trial affidavit and with the weight of the evidence previously discussed, which indicates that O'Hair was merely going through the motions and had no real intent to hire any of the Pritchard employees except Diaz. I also credit Garcia that O'Hair said, in response to her mention of the Union, that the Union was no good and was only after the employees' money. This is consistent with testimony of other witnesses who recalled similar statements by O'Hair.

On January 18 and 21, O'Hair interviewed several of the Pritchard employees on the night crew, i.e. Eleazer Mendoza, Santiago Restrepo, Ivan Sanchez and Gustavo Sanchez. All four had completed their applications on or about January 8, after the Union meetings, and had submitted them to the Respondent through Maran on January 10. Gustavo Sanchez, who worked nights in the laundry, and his brother Ivan Sanchez, who had been working during Aldemar Sanchez' leave of absence, were no longer working at the Respondent's facility when they were called for an interview. O'Hair conducted these four interviews in the conference room off the lobby. Mendoza had sufficient command of English to participate in his interview without a translator. Carmen Colon acted as translator for Restrepo and Ivan Sanchez and Oyola translated for Gustavo Sanchez.[45] There is no dispute that, in conducting these four interviews, O'Hair used a form questionnaire that he admittedly developed after the interviews of Nelson, Garcia and Ortiz. All the witnesses agreed that O'Hair asked the questions on the form and wrote down the employees' answers on the form. As a result, there is substantial similarity in the testimony regarding these four interviews.

Mendoza, who impressed me as a credible witness, recalled that O'Hair appeared surprised when he told O'Hair, in response to the question where he was currently working, that he worked for Pritchard at the Y. Mendoza, who filled his application out in a hurry, had neglected to list his current employment with Pritchard. In addition, according to Mendoza, he assumed everybody knew he was already working there when he filled out the application. After Mendoza told O'Hair he was working for Pritchard, O'Hair asked him if he was part of the Union. Mendoza replied that he was but that he didn't always agree with the Union's procedures. Mendoza testified further that, at another point during the interview, O'Hair said he wouldn't hire people from the Union because "if you work here, you don't need a union." O'Hair said that the Y provided good wages and benefits and a good working environment. According to Mendoza, O'Hair told him that he had a position working from 8:00 PM until 4:00 AM. Mendoza acknowledged telling O'Hair that he couldn't work those hours because he had a full-time job where he worked until 10:30 PM. He also told O'Hair that he could work from 11:00 PM until 4:00 AM, and if the hours were available, until 7:00 AM. O'Hair only disputed the portion of Mendoza's testimony involving the discussion of the Union. O'Hair admitted being surprised to learn that Mendoza worked for the Respondent because he had not met him before. I shall credit Mendoza's testimony to the extent there are any conflicts. Specifically, I find that O'Hair did ask Mendoza if he was part of the Union, upon learning that he worked for Pritchard, and did tell Mendoza that he wouldn't need the Union if he worked for the Respondent.

O'Hair interviewed Santiago Restrepo with Carmen Colon serving as the translator. Thus, Restrepo's testimony is essentially what Colon told him in Spanish that O'Hair had said. Restrepo denied that he or O'Hair mentioned the Union during the interview. However, on the

[45] Although Oyola recalled that the male employee for whom he translated was called "Jose", Gustavo denied that anyone called him by that name. As previously noted, I found Oyola's testimony unreliable.

interview questionnaire that O'Hair filled out during the interview, he wrote that Restrepo said he learned about the job from the Union. According to Restrepo, he told O'Hair that he could work the same hours he was currently working for Pritchard, i.e. 8:00 PM – 2:00 AM. Restrepo recalled O'Hair asking him if he could change his hours. Restrepo admittedly told O'Hair that would be difficult because he was taking English and computer classes from 5:00-7:00 PM and had another part-time job in the morning. Restrepo testified that, at the end of the interview, O'Hair said he would call him if he found hours for him. Restrepo never heard from O'Hair after the interview. O'Hair testified that he had a good interview with Restrepo and was interested in hiring him. O'Hair acknowledged that the Union did come up when he asked Restrepo how he found out about the job at the Y. O'Hair claims that the only reason he didn't offer Restrepo a job is that Bertini told him, after the interview, not to hire him. Bertini denied ever saying such a thing to O'Hair and denied that O'Hair ever told him that he was considering hiring Restrepo. I credit Bertini as to this aspect of the testimony.

Carmen Colon also translated during O'Hair's interview of Ivan Sanchez. Ivan Sanchez recalled only that O'Hair asked him a series of questions off a form and Colon translated the questions and his answers. Although Ivan Sanchez confessed that he did not have a clear memory of the interview, he did recall telling O'Hair that he was available to work any shift and that, while he was currently working part-time, he was interested in full-time work. He denied telling O'Hair that he would only work from 5:00-11:00 PM. The answers O'Hair wrote on the interview questionnaire corroborate Ivan Sanchez' testimony in this regard. Ivan Sanchez recalled further that he also told O'Hair that he heard about the job through the Union. After having his memory refreshed with leading questions, Ivan Sanchez recalled that O'Hair said if he offered him a job, there would be no union. O'Hair testified that Sanchez was only looking for a full-time position with different hours than he had available. According to O'Hair, Ivan Sanchez said he could not change his hours because he had another job. He recalled that the only mention of the Union was Ivan Sanchez' response when asked how he learned about the job. I found Ivan Sanchez testimony more credible that that of O'Hair. The responses O'Hair wrote on the interview form belie any suggestion that Ivan Sanchez was not flexible regarding his availability to work. O'Hair also acknowledged that the post-it note on the application suggesting that Oyola testified for Ivan Sanchez was incorrect. O'Hair confirmed that Carmen Colon was the translator.[46]

Gustavo Sanchez recalled that the guy from maintenance, probably Oyola, translated during his interview.[47] Sanchez recalled O'Hair using the form to ask questions. He also recalled O'Hair asking if he would be interested in working anywhere other than the laundry. Gustavo Sanchez testified that he said he would and that he already had another job as a cleaner. Gustavo Sanchez also recalled that O'Hair asked if he was interested in full- or part-time. Gustavo Sanchez conceded that he replied that he would prefer a part-time job because he already had another job in the mornings. He recalled O'Hair asking him if he knew how to clean carpets and he said yes. According to Gustavo Sanchez, O'Hair said he was considering him for a full-time job as a custodian and that the Respondent only offered benefits to full-time

[46] Carmen Colon was totally useless to the Respondent as a corroborating witness. She claimed to have no recall of any of the interviews she translated. She could not recall how many interviews she attended, or even if any of the interviewees were male or female. The only thing she recalled was that O'Hair used a form questionnaire. In light of her asserted poor memory, her testimony that O'Hair did not ask any questions about or even discuss the Union at any of the interviews she translated can not be relied upon as proof of these facts.

[47] As noted above, Oyola recalled that the man for whom he translated was known as "Jose". Gustavo Sanchez credibly testified that no one has ever called him "Jose".

workers. Gustavo Sanchez testified that he replied that, with the Union, part-time employees also receive benefits. Gustavo Sanchez recalled that O'Hair replied that, if he was going to work for the Respondent, he would be without a union because O'Hair didn't want a Union. O'Hair testified that the union did not come up during Gustavo Sanchez' interview. According to O'Hair, he learned from this interview that Gustavo Sanchez had no experience in housekeeping, that he only worked in the laundry. O'Hair also testified that Gustavo Sanchez was only looking for a part-time position and that he did not have one available for him. [48] I shall credit Gustavo Sanchez' testimony to the extent it conflicts with O'Hair. Gustavo Sanchez had disclosed on his application that he already did maintenance work for another cleaning contractor. Thus, O'Hair's claim that Gustavo did not have cleaning experience is wholly unbelievable.

The last of the Pritchard employees to be interviewed was Reese Dinkins. Dinkins had worked at the Respondent's facility for 25 years, first for the Respondent and then for Pritchard. Dinkins did not submit an application until January 25. He acknowledged that, at least initially, he wasn't sure that he wanted to work for the Respondent. Dinkins testified that, when he decided to apply, he asked Carmen Colon at the front desk who was in charge of the applications and she paged someone who came down to interview him. Dinkins did not recall the name of the man who interviewed him but testified with certainty that it was not O'Hair, who was sitting in the hearing room when he testified. Dinkins testified that the man, whom he recognized as the guy who worked with O'Hair in maintenance and who sometimes came in at night to fix things, identified himself as the person who was going to be in charge of the maintenance department. According to Dinkins, he told the interviewer that he would like to keep the same hours he was working, i.e. 10:00 PM – 2:30 AM during the week and 7:00-10:00 PM on Saturday. The man told Dinkins that all he had available was a part-time position from 5:00-10:00 PM and a full-time position from 8:00 AM – 4:00 PM. Dinkins conceded that he told the man that he did not want to work full-time and that he could not work from 5-10 PM because of his other job. The interviewer responded that he only had the one part-time position and that he would call Dinkins if anything changed. Dinkins recalled that the interviewer did look over his application but did not ask any questions about his experience. He specifically recalled that the interviewer did not use a form questionnaire. According to Dinkins, the entire interview lasted five or six minutes. Dinkins testified further that, a couple days after he stopped working at the Y, Carmen Colon called him and said that she had been told to call him to tell him that they had nothing available for him.

O'Hair testified, contrary to Dinkins, that he was the one who interviewed Dinkins. O'Hair also recalled that Dinkins interview occurred on January 18, not 25. According to O'Hair, he was in the conference room interviewing other applicants when Colon came in and said that Dinkins was at the front desk, insisting on an interview right away. O'Hair testified that, after he finished the interview he was doing, Dinkins approached him in the lobby and handed him an application. O'Hair claimed that Dinkins, who appeared very agitated, asked for an immediate interview. O'Hair asked the person who was scheduled to be interviewed next to wait and took Dinkins into the conference room. O'Hair testified that he asked Dinkins to schedule an interview but that Dinkins said he was here now and asked why O'Hair couldn't talk to him now. O'Hair then flipped through the application while asking Dinkins to tell O'Hair about himself. O'Hair recalled Dinkins talking about how many years he had worked at the Y, even before working for Pritchard, and indicating an interest in part-time employment, saying that he already

[48] Although Oyola "corroborated" O'Hair's testimony that the Union did not come up during the interview with "Jose" and that "Jose" was only interested in a part-time position in the laundry, I do not credit this testimony for the reasons noted above regarding Oyola's unreliability as a witness.

had a full-time job. O'Hair told Dinkins that the hours he had available were from 5:00 PM to 10:00 PM. Dinkins said, because of his commitment to the other job, he could not change his hours. Dinkins asked if he could work the same hours he was working and O'Hair told him the only other position he had was full-time overnight, from 8:00 PM to 4:00 AM. Dinkins said he couldn't work those hours and asked again if he could keep the same hours he had. When O'Hair told him no, the interview ended. According to O'Hair, neither he nor Dinkins brought up the Union.

The Respondent called Ronald Gagnon as a witness. Gagnon was hired by O'Hair in July 2001 and held the position of Maintenance Supervisor in January. Oyola was one of the employees under his supervision. At the time of the hearing, Gagnon was the supervisor for the housekeepers and custodians employed by the Respondent. It appears that Gagnon is the man whom Dinkins described as his interviewer. The Respondent, however, did not ask Gagnon if he had interviewed or even spoken to Dinkins. When the General Counsel asked on cross-examination if he had any involvement in the hiring of the housekeeping and custodial staff, Gagnon said he did not. Gagnon did testify that, in January when the hiring process was going on, he had a beard like that of O'Hair and that people often confused the two of them. I noted that Gagnon was somewhat argumentative and defensive when responding to questions from the General Counsel, suggesting that he was not being entirely candid in the interest of protecting his boss and employer.[49]

Dinkins' testimony that someone other than O'Hair interviewed him appears at first blush to be inconsistent with all the other evidence in the record indicating that only O'Hair interviewed applicants, and inconsistent with Gagnon's denial that he interviewed anyone. At the same time, O'Hair's testimony was essentially uncorroborated. The Respondent could have questioned Colon about the Dinkins' incident and could have elicited a specific denial from Gagnon that he interviewed Dinkins. The fact that these were witnesses one would expect to testify favorably for the Respondent supports an inference that, had they been asked about this incident, they would not have corroborated O'Hair. *Grimmway Farms,* 314 NLRB 73, fn. 2 (1994). In evaluating the credibility of Dinkins testimony, I also note that Gagnon ultimately became the supervisor in charge of the housekeeping and custodial staff and that Dinkins interview occurred shortly before the Respondent took over these operations. Thus, it is not so far-fetched to believe that Colon would have called Gagnon when Dinkins asked to see whomever was going to be in charge of maintenance.[50] It's also conceivable that Colon would have called Gagnon, O'Hair's assistant who was going to be in charge of the staff, if O'Hair were not available. Weighing the relative credibility of Dinkins and O'Hair, I am persuaded that Dinkins was the more credible.

There is no dispute that the Respondent did not interview the remaining three alleged discriminatees, Jose Tobon, Jose Gavalo and Fabiano Filigrana.[51] O'Hair testified that the only reason he did not interview these Pritchard employees is that they failed to respond to telephone messages asking them to call to schedule an interview. O'Hair conceded that he was not the individual who called these employees to schedule an interview. He delegated that function to Colon, who was bi-lingual and could communicate with these Spanish-speaking

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[49] The Respondent also did not ask Colon any questions to corroborate O'Hair's testimony about Dinkins agitated demand for an immediate interview.

[50] Gagnon was, in fact, the "maintenance" supervisor.

[51] The applications of Tobon and Filigrana were included in the group submitted by Maran after the "march on the boss". Tobon, the Union's steward, had participated in this activity. Gavalo got his application from the front desk, filled it out and returned it the same day, January 12.

applicants. All three Pritchard employees denied receiving any messages from the Respondent about an interview. All three testified that they have answering machines where they live, that no messages were left on the machine, and that other family members with whom they live never told them that someone from the Y had called and left a message for them. The General Counsel even called Filigrana's son, Javier, with whom he lives. Javier Filigrana is the only one in the household who speaks English and, for this reason, he is the only one who checks the answering machine for messages. Javier Filigrana denied that any messages from the Respondent for his father were received at his house.

Colon testified generally about her role in the hiring process. As previously noted, she was the person at the front desk who usually handed out and received applications and she assisted O'Hair with translation during interviews for an undisclosed number of Spanish-speaking applicants. Colon testified that O'Hair also asked her to call people to schedule interviews. According to Colon, O'Hair gave her a list of names and phone numbers with dates and times he wanted to interview them. She called the people on the list at the telephone numbers indicated and, if they answered, she would schedule the interview and give O'Hair a note telling him what date and time they were coming in. If someone other than the applicant on the list answered the phone, or if an answering machine picked up, she left a message, in English or Spanish, depending on the language used by the person or voice on the answering machine. According to Colon, she always identified herself as calling from the Respondent for the purpose of scheduling a job interview. Colon recalled that she made about 30 –35 calls like this and spoke to about 10 people. She did not retain the list that O'Hair gave her, nor any notes or other documents compiled in the course of scheduling these interviews. Colon also acknowledged that she had no recollection as to the identity of any of the people she called or left messages for. Thus, she was unable to confirm O'Hair's testimony that Tobon, Gavalo and Filigrana were contacted for an interview.

The amended complaint alleges that the Respondent, through O'Hair, violated Section 8(a)(1) of the Act, during O'Hair's interviews of the Pritchard employees, by making statements implying that the employees would be denied future employment because of their union membership and activities. Although the complaint alleges that this occurred on January 21 and 24, the evidence described above establishes that the interviews in question occurred on January 11, 15, 18 and 21. The Respondent denied this allegation on the basis of credibility. Based on the credibility determinations previously noted, I find that the General Counsel has met his burden as to this allegation. Specifically, I have found that O'Hair told Caicedo that he didn't work with unions and that the job would not have a union but would have benefits. I have found that O'Hair made similar statements to Mendoza (that he wouldn't need a union if he worked for the Respondent because the Respondent provided good wages and benefits); Ivan Sanchez (if O'Hair offered him a job, there would be no union); and Gustavo Sanchez (if he was going to work for the Respondent, it would be without a union). These statements are unlawful because they clearly conveyed to the applicants that the Respondent would not hire them if they wish to remain members of the Union. Such statements also support a finding that, in staffing its new in-house laundry, cleaning and janitorial department, the Respondent intended to ensure that it operated on a non-union basis. I have also found that O'Hair told both Garcia and Ortiz that the Union was not good for the employees and only wanted to take their money and that he told Garcia that he was only interviewing the Pritchard employees because he had to. These statements further support the inference that the Respondent was opposed to the Union and did not have a sincere intent to consider the union-represented Pritchard employees for hire. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, through statements made by O'Hair during his interviews of the Pritchard employees.

E. *O'Hair's Statement to Nelson on February 1*

Nelson testified that, on her last day of work at the Respondent's facility, she rode on the elevator to the 11th floor with O'Hair. After she got off the elevator, as she was walking toward the cleaning closet, O'Hair called after her. According to Nelson, O'Hair said, "why don't you call the Union lady and ask her to fire somebody from their job so you can replace them." Nelson asked, "why should I take another person's bread?" and O'Hair replied, it was only a suggestion. O'Hair did not specifically rebut this testimony. The General Counsel alleges that O'Hair's statement to Nelson on February 1 violated Section 8(a)(1) of the Act because it implied that employees would be denied future employment with the Respondent because of their union membership and other protected concerted activities and because the Union had filed the unfair labor practice charge in Case No. 34-CA-10011. In his brief, counsel for the General Counsel argues that the statement was unlawful because, at the time, Nelson was still waiting to hear if the Respondent hired her. By suggesting Nelson use the Union to try to bump another employee, O'Hair was effectively telling her that she would not be offered employment by the Respondent. I do not agree with the General Counsel that this was the implication of O'Hair's suggestion. While I credit Nelson's uncontradicted testimony that the statement was made, I do not find anything threatening or coercive in this statement. Accordingly, I shall recommend dismissal of this allegation of the complaint.

F. *The Respondent's Hiring Process*

As previously noted, the Respondent made the decision to take over the laundry service from Pritchard and informed Pritchard of that decision in mid-December, 2001, and informed Pritchard, by letter on December 27, 2001, that it was taking over the remainder of the services provided by Pritchard. The Respondent planned to assume control of the laundry operation by January 14 and the remainder of the housekeeping and janitorial operations by February 1. There is no dispute that, soon after making these decisions, O'Hair began the process of filling the 13 positions he expected to have available.[52] The Respondent admittedly did not approach any of the Pritchard employees and did not advertise for these positions at first. Instead, O'Hair relied on "word-of-mouth" to solicit applicants for employment. The first applicants were friends and family members of employees currently working for the Respondent. As previously noted, the first employees hired, to work in the laundry, were the mother and best friend of a fitness instructor. O'Hair testified that he then hired Diaz, who was Pritchard's full-time employee in the laundry department, to train these inexperienced employees. According to O'Hair, it was his intent to have Diaz become the housekeeping supervisor, or lead person, after he trained the new laundry employees. There is no dispute that Diaz had no experience as a supervisor and had not previously worked in housekeeping.

Diaz completed his application, was interviewed and hired on December 26. O'Hair testified that Bertini came to him, after the Respondent informed Pritchard that it was terminating Pritchard's laundry service, and asked O'Hair if he could find a position for Diaz. According to O'Hair, Bertini told him that, out of all the employees there, Diaz was the only one he could depend on. O'Hair testified further that he told Bertini to have Diaz file an application. O'Hair claims that Bertini approached him later and asked if Diaz had filed an application and,

[52] O'Hair testified that, in designing the Respondent's in-house laundry, housekeeping and janitorial department, he planned for a staff of 13 mostly full-time employees. According to O'Hair, because full-time employees would receive benefits, the Respondent was providing an incentive for individuals to do a good job for the Respondent. O'Hair's plan also called for two working supervisors to provide the on-site supervision that Sadler and Bertini claimed had accounted for the Respondent's complaints about Pritchard's performance.

later still, to ask O'Hair what he had planned for Diaz. O'Hair testified that he told Bertini of his plans to have Diaz become the housekeeping supervisor. At other points in his testimony, O'Hair claimed that he asked Bertini if there were any Pritchard employees he could recommend and Bertini replied that Diaz was the only one he could count on. O'Hair acknowledged that, at the time of this discussion, he did not ask Bertini about any other Pritchard employees and that he and Bertini did not discuss any other Pritchard employees' prospects for employment with the Respondent.

Bertini admitted having a conversation with O'Hair, in his office, in which Diaz' name came up. According to Bertini, this conversation occurred before the Respondent had notified Pritchard that it was terminating the laundry service. Bertini recalled that O'Hair asked him who was his best worker at the Y. According to Bertini, he replied that, if there was anyone he could count on, it was Diaz. O'Hair asked, "the laundry guy?" and, when Bertini said yes, O'Hair said he had noticed that Diaz was a good worker. Bertini testified that O'Hair did not say anything about hiring Diaz or anyone else during this conversation. Bertini testified further that, the next day, O'Hair asked him what would happen to Diaz if the Respondent terminated Pritchard's contract for the laundry service. Bertini told O'Hair that, depending on Diaz' seniority, he could go to another facility or bump someone at the Y. He had no further discussion with O'Hair about hiring Diaz. When the General Counsel re-called Bertini as a rebuttal witness, Bertini denied asking O'Hair to find a place for Diaz or making any specific recommendation that O'Hair hire Diaz. Bertini again confirmed that the only thing he told O'Hair, in response to a question from O'Hair, is that Diaz was the only employee he could count on.

When Diaz filled out his application, he wrote "lead housekeeper" as the position he was applying for. His application was "incomplete" to the same extent as those of some other Pritchard employees with respect to his employment history. Diaz did not identify any specific experience working anywhere other than for Pritchard in the laundry department at the YMCA. There is no dispute that Diaz was not truthful when he wrote on his application that he supervised a staff of five while working at the YMCA and that he "watched over housekeeping staff." In contrast to O'Hair's testimony regarding his review of the applications submitted by the other Pritchard employees, O'Hair hired Diaz to eventually become the housekeeping supervisor notwithstanding these problems with his applications.

The Respondent argues, relying almost exclusively on O'Hair's testimony, that the Respondent had only "a few short weeks" after it made its decision to take over the services provided by Pritchard, to interview and hire staff and that O'Hair sought to hire "the best people he could find". According to the Respondent, O'Hair hired only those applicants who were experienced or came highly recommended by people he knew and trusted. The evidence in the record, in particular the applications of the people who were hired, belie this argument. While it is true that the first people hired by O'Hair were referrals from Caro, the fitness instructor, and Colon, the front desk clerk, there is no evidence in the record that O'Hair had any special relationship with these individuals that would give rise to the level of trust that Respondent suggests existed. Caro's mother had done office work and mail sorting and his best friend had been a cook. Neither had ever worked in a laundry. O'Hair conceded that one of the three people he hired who had been referred by Colon had no relevant experience. While other applicants hired before the Respondent went public with its hiring plans listed relevant experience on their application, there is nothing in the record, apart from O'Hair's testimony, to indicate that they were any more qualified that the Pritchard employees currently doing the work. Another employee hired by O'Hair before the Respondent advertised the job openings, was an individual who had worked for O'Hair at a previous job. This individual was hired as a housekeeper even though his experience working for O'Hair was in a different department. As a result of this hasty and allegedly thorough hiring process, O'Hair was successful in filling a

majority of the job openings he had, i.e. eight out of thirteen, before the Respondent went public with its need for housekeeping and janitorial workers.

After the Respondent's ad appeared in the newspaper, the Respondent was deluged with applications, including some filed by Pritchard employees who were now aware of the Respondent's plans. O'Hair continued to interview and hire employees without interviewing any Pritchard employees until after the Union began its campaign publicizing the Respondent's failure to consider its members for hire. Despite interviewing nine of the Pritchard employees between January 11 and 25, O'Hair hired none. Respondent instead chose to hire individuals who had little or no experience, including a college graduate whom O'Hair conceded was overqualified. As to be expected, this individual lasted three days and did not return to work. Rather than hire any of the Pritchard employees who were still available, Respondent hired someone else to replace this individual. The Respondent also chose to hire a couple employees who were unable to begin employment because they didn't pass the drug test, background check, or other pre-employment requirements of the Respondent. Even in these situations, O'Hair did not consider any of the Pritchard employees whose applications were on file to fill these new openings. Finally, there is no dispute that, as openings have occurred through employee turnover in the period since the Respondent took over from Pritchard, it has never offered a job to any of the Pritchard employees.

The Respondent contends that it hired none of the Pritchard employees other than Diaz because of its general dissatisfaction with Pritchard's performance of this work and because Bertini only recommended one employee, Diaz. At the hearing, O'Hair purported to provide specific reasons why he didn't hire each of the Pritchard employees he interviewed.[53] The Respondent argues that the reasons advanced by O'Hair were sufficient to rebut any inference of a discriminatory motive. The General Counsel contends that the reasons were pretextual. I find it unnecessary to review in detail the reasons advanced for not hiring each of the Pritchard applicants. As previously noted, it is clear to me that O'Hair had no interest in hiring any Pritchard employee other than Diaz, and that he went through the charade of inviting the employees for interviews and interviewing them merely to attempt to protect himself from the Union's claims that the Respondent was not considering Pritchard's employees for illegal reasons. The real question in this case is whether, in not considering the Pritchard employees for hire, O'Hair was motivated by their status as union members or by the Respondent's documented and essentially undisputed dissatisfaction with Pritchard's performance of its contract.

G. *Whether the Respondent's Refusal to Hire the Pritchard Employees Was Discriminatorily Motivated*

The Board, in *FES (A Division of Thermo Power),* 331 NLRB 9 (2000), established a new test for determining the merits of discriminatory refusal to hire allegations under the Act. Under this test, the General Counsel must first show the following:

1. that the respondent was hiring, or had concrete plans to hire, at the time of the alleged refusal to hire.
2. that the applicants had experience or training relevant to the announced or generally known requirements of the available positions, or in the alternative,

[53] The Respondent contends that it did not hire the three employees who were not interviewed because they had not responded to messages left for them to call and schedule an interview.

that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and

3. that antiunion animus contributed to the decision not to hire the applicants.

Once the General Counsel has established these three elements of his case, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union or other protected concerted activity.[54] If the respondent contends that the applicants were not qualified for the positions it was filling, it will bear the burden of showing that the applicants either did not possess the specific qualifications required for the position, or that others who were hired had superior qualifications. *Id.* at 12. Accord: *Wayne Erecting, Inc.,* 333 NLRB No. 149 (April 30, 2001); *Stamford Taxi, Inc.,* 332 NLRB 1372, 1374-1375 (2000).

Based on the above review of the evidence, I find that the General Counsel has satisfied the first two requirements of his case. There is no dispute that the Respondent was hiring housekeeping, janitorial and laundry employees at the time of the alleged refusal to hire. Because the Pritchard employees whom the Respondent refused to hire were already working in those positions at the time that the Respondent refused to hire them, they clearly had the relevant experience or training.[55] Even assuming the Respondent required a higher level of skill or experience to fill the new positions, it did not adhere to these requirements. As previously noted, O'Hair hired several individuals with no experience in housekeeping or cleaning and with no identifiable skills for such a position.

With respect to the third element of the General Counsel's case, I find that the General Counsel has met his initial burden of proving that anti-union animus contributed to O'Hair's refusal to hire the alleged discriminatees. I have already found above that O'Hair told Abate on January 8 that he was not interested in meeting with a bunch of union workers and that he told Maran and the employees who were with her on January 10 that he was not going to accept applications from the Union. In addition, O'Hair admitted on the witness stand that he told Abate that he was not going to hire anybody through the Union. These statements, as well as Sadler's credible testimony that O'Hair told him, in response to Sadler's statement that the Respondent would not be able to achieve significant cost savings because the Union was committed to the building, that the Union was not an issue because the Respondent had already checked it out with the lawyers, establishes that O'Hair was fully cognizant of the unionized status of Pritchard's employees and the consequences of hiring them when he made his hiring decisions.[56] Moreover, the independent violations of Section 8(a)(1) found above, including the statements made to employees during interviews, i.e. that there would be no union if the employees were hired by the Respondent, establish ant-union animus and reflect upon O'Hair's motives.

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[54] This is similar to the burden imposed on a Respondent in other cases alleging a discriminatory motive under the Act. See *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[55] Although the Respondent sought to show that O'Hair made changes in the job descriptions for the positions he planned to have in the Respondent's new department, the changes were not substantial. Moreover, O'Hair himself testified several times that the positions he was hiring for were unskilled and easily trainable.

[56] O'Hair acknowledged at the hearing that he discussed the Union with Bertini "a few times" when the two of them were discussing how the Respondent would go about setting up an in-house cleaning department.

In addition, the circumstances surrounding the Respondent's staffing of its in-house cleaning, janitorial and laundry department strongly support an inference that the unionized status of the Pritchard employees was a contributing factor in O'Hair's decision to hire only one of them. For example, the Respondent did not advertise or otherwise publicize the fact it was hiring until after it had filled a majority of the available positions. This placed the unionized Pritchard employees at a distinct disadvantage in obtaining employment and suggests that the Respondent wanted to ensure that a majority of its new workforce were not former bargaining unit employees. In addition, the Respondent hired several new employees with no relevant experience or skills, several of whom proved to be utter failures, without giving any consideration to admittedly good workers like Kathleen Nelson, Caicedo, Mendoza, Ivan Sanchez and Restrepo. The refusal to hire an employee like Dinkins, who had worked at the facility in excess of 20 years and had previously worked for the Respondent, strongly suggest that something more than dissatisfaction with the work of Pritchard's employees was at play.

The Respondent argues that it was O'Hair's unhappiness with Pritchard's performance, as evidenced by his frequent communications to Bertini in the months preceding the Respondent's decision, that motivated O'Hair's lack of interest in hiring any of the Pritchard employees other than Diaz. The Respondent also relies on Bertini's statement to O'Hair that Diaz was the "only one he could count on" as explanation for the otherwise suspect hiring of only one employee from the Unit.[57] The Respondent's argument finds some support in Abate's testimony that O'Hair said, during their January 8 telephone conversation, that he was unlikely to hire many of the Pritchard employees because he was not happy with their work. While the Respondent's argument has some surface appeal, it does not hold up under closer scrutiny. Looking at the situation from a neutral business standpoint, one would expect that, in starting a new operation like this, an employer would look to the people who were already doing the work, who were familiar with the Respondent's facility and its needs. The Respondent instead solicited and hired applicants with little or no experience doing the type of work it had available who were strangers to the Respondent's facility. It is undisputed that there were at least a few Pritchard employees other than Diaz, such as Kathleen Nelson and Adrian Caicedo, whose work was deemed satisfactory by the Respondent. The Respondent's failure to consider these individuals in the early stages of its staffing process suggests it was not just Pritchard's poor performance that was at issue. As to the other Pritchard employees, the Respondent offered no evidence that their work was so unsatisfactory as to warrant zero consideration in the early stages of the hiring process.[58] Moreover, at the time O'Hair was making these early hiring decisions, he did not even know many of the Pritchard employees or which areas each was responsible for. O'Hair testified that he did not recognize most of the employees who were with Maran during the January 10 "march on the boss" and admitted being surprised during the interview to learn that at least one of the applicants was a current Pritchard employee. Thus, how could he have known, in late December and early January, which of the Pritchard employees were responsible for the general dissatisfaction with the level of service that Pritchard was providing?

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[57] I discredit O'Hair's testimony that Bertini made any specific negative recommendation regarding the hiring of the other Pritchard employees. I found Bertini generally a more credible witness notwithstanding any continued ties he might have to the Union. Bertini candidly admitted a number of statements and comments attributed to him while denying those which were plainly not true.

[58] The Respondent's contention that it was pressed for time and needed to find people in a hurry to staff the new housekeeping and laundry department makes O'Hair's failure to give any consideration, before January 10, to the current Pritchard employees doing the work particularly suspect.

The Respondent also relies upon the fact that the Respondent hired Diaz, who was a union member, as proof that it had no anti-union animus. After careful consideration, it is apparent to me that the reason O'Hair hired one Pritchard employee to become the housekeeping supervisor is because he realized that he needed to have someone familiar with the facility and the processes used to clean it who could train the new employees he was going to hire to replace Pritchard's employees. This explains why O'Hair asked Bertini who was his best worker at the YMCA. By hiring the one employee Bertini identified as his best worker, O'Hair could maintain some continuity without having to hire a majority of Pritchard's employees.

The General Counsel having met his initial burden of proving a discriminatory refusal to hire, the burden is on the Respondent to prove that it would not have hired the applicants even in the absence of their union or other protected concerted activity. The Respondent clearly has not established that the Pritchard employees were not qualified for the positions it was filling. Because the Pritchard employees were already cleaning the Respondent's facility and doing its laundry, and because the Respondent concedes that no specialized skills or abilities were required to perform these jobs, the Respondent can not meet its burden of proving that the Pritchard employees "did not possess the specific qualifications required for the position." The credible evidence in the record also does not objectively establish that the individuals who were hired had superior qualifications.[59] That leaves the Respondent with having to prove that it would not have hired anyone other than Diaz because either their work performance while working for Pritchard was poor, or because they were not available to work the hours that the Respondent had available, or because they did not respond to requests for interviews.

I have already discussed the patently pretextual claim that the Respondent did not hire Nelson because she told O'Hair she wasn't interested in working for the Respondent. The Respondent thus can not meet its burden of proving that she would not have been hired in the absence of discrimination. The Respondent contends that it would not have hired Tobon, Gavalo and Filigrana, even absent evidence of discrimination, because they failed to respond to requests for interviews. The Respondent has not met its burden of proof on this issue. The only witness the Respondent offered to prove that each of these alleged discriminatees were contacted was unable to recall whether she in fact called them and left a message. The Respondent retained no records to prove that the calls were made. The document which purports to be a list of individuals that O'Hair asked Colon to call is admittedly not the list that O'Hair gave Colon. Rather it is one generated by O'Hair's computer at the time of the hearing. In addition, the Respondent could have communicated with these individuals, who were all still working at the Respondent's facility, had O'Hair truly been interested in considering them for employment. The Respondent had communicated with other employees, such as Nelson, Garcia and Ortiz, at work. Accordingly, I find that this asserted ground for not hiring Tobon, Gavalo and Filigrana is pretextual.

The Respondent's claims that Dinkins, Mendoza, and Gustavo and Ivan Sanchez would not have been hired even absent evidence of a discriminatory motive because they could not work the hours that the Respondent had available might have been persuasive had the Respondent given them an equal opportunity for employment with the individuals that were hired before January 6. The Respondent's discriminatory delay in interviewing these Pritchard employees left them with only a few jobs to choose from. It is impossible to know whether any of these four discriminatees would have been able to work one of the Respondent's proposed

[59] Because I found O'Hair to be generally not credible, I attach little weight to his subjective testimony as to the relative superiority of the applicants he did hire.

schedules had they been made aware of the job openings sooner. Because it was the Respondent's discriminatory hiring practice that limited the employment possibilities for the Pritchard employees, I shall reject the Respondent's defense based upon any alleged unavailability of the Pritchard employees. Moreover, I have already discredited O'Hair's testimony that Ivan Sanchez indicated an unwillingness to change his hours and I have discredited O'Hair's testimony that Gustavo Sanchez indicated any lack of cleaning experience. Finally, I note that the evidence reveals that the Respondent displayed significantly more flexibility in accommodating the needs of the non-Pritchard employees it hired when it came to scheduling them to work. In the months after the Respondent took over the laundry, cleaning and janitorial services, it made adjustments in several positions, either from full to part-time or vice versa, or to change the hours of work to accommodate an individual employee's needs. This evidence convinces me of the pre-textual nature of this asserted ground for not hiring any Pritchard employees.

The Respondent argues that it would not have hired Restrepo, even in the absence of a discriminatory motive, because Bertini told O'Hair not to hire him. Although Bertini, when pressed on cross-examination, testified that he might have been critical of Restrepo in conversation with O'Hair, he denied having the conversation described by O'Hair. O'Hair's testimony that Bertini said, "no, no, no. You don't want him", while shaking his head, in response to O'Hair's expression of interest in hiring Restrepo, was not believable. There is nothing in the record to support such a vehement negative response by Bertini. I therefore reject the Respondent's argument with respect to its allegedly non-discriminatory refusal to hire Restrepo.

The Respondent contends that Caicedo would not have been hired in any event because he had an attendance problem. While there is no dispute that Caicedo was absent one day during the Respondent's hiring process and sent someone to cover for him, the weight of the evidence convinces me that this isolated incident would not have caused the Respondent to deny him employment in the absence of the Respondent's discriminatory motive. As previously noted, O'Hair had expressed satisfaction with Caicedo's work to Bertini before this incident and apparently did not make a big deal out of it at the time. At the hearing, O'Hair exaggerated the seriousness of Caicedo's attendance problem by claiming he had missed several days without calling in, which is not supported by the Pritchard timesheets in evidence. The pretextual nature of O'Hair's asserted reason for refusing to hire Caicedo is further demonstrated by the fact that the post-it note he placed on Caicedo's application makes no mention of any attendance problem.

Finally, the Respondent argues that it would not have hired Garcia and Ortiz because of performance problems. O'Hair testified, however, that he was considering hiring them despite the work performance issues and changed his mind after getting a negative reference from Bertini the day after the interview. O'Hair claimed that he also did not hire them because he found better candidates. The record does contain evidence that the Respondent had complained to Pritchard on many occasions about the cleanliness of the residential floors that were cleaned by Ortiz and Garcia. There is also undisputed evidence that O'Hair had complained to Bertini about Garcia and Ortiz apparently "loafing" in the Pritchard office during their work hours and about Ortiz smoking on the loading dock. Bertini testified that O'Hair voiced general complaints about cleanliness, not any specific complaints about Ortiz or Garcia. Bertini also denied that O'Hair asked him specifically about Garcia and Ortiz after their interviews. With respect to the complaints of "loafing" and smoking, Bertini addressed these issues with Garcia and Ortiz and heard nothing further from O'Hair. The record also indicates that these complaints preceded the Respondent's hiring decision by several months.

The preponderance of the evidence in the record indicates that Garcia and Ortiz were not model employees. At the same time, Bertini's contradiction of much of O'Hair's testimony convinces me that O'Hair was exaggerating the seriousness of these issues to mask his true motivation in not hiring Garcia and Ortiz. The Respondent's claims of a legitimate reason for refusing to hire these, or any other Pritchard employees, are less persuasive than they would have been had the Respondent given the Pritchard employees an equal chance at employment. Similarly, the Respondent's contention that only one of Pritchard's 14 employees currently working at the YMCA was suitable for continued employment strains credulity.

Accordingly, based on the above, and the record as a whole, I find that the Respondent has not meet its burden of proving that it would not have hired any of the twelve alleged discriminatees even in the absence of a discriminatory motive. See, e.g., *Hogan Masonry, Inc.,* 314 NLRB 332 (1994). (Respondent did not meet its burden under *Wright Line,* supra, by relying on the discredited testimony of its official who made the allegedly discriminatory decisions). Therefore, I find, as alleged in the complaint, that the Respondent refused to hire the twelve named Pritchard employees because of their status as union-represented employees and in order to avoid a bargaining obligation to the Union. *Waterbury Hotel Management LLC,* 333 NLRB No. 60 (March 9, 2001), enfd. 314 F.3d 645 (D.C. Cir. 2003). Cf. *Planned Building Services,* 330 NLRB 791 (2000). The Respondent's refusal to hire these employees violated Section 8(a)(1) and (3) of the Act.

H. *Whether the Respondent Violated Section 8(a)(5) by its Refusal to Recognize the Union*

The complaint alleges that the Respondent, as a successor to Pritchard, had an obligation to recognize and bargain with the Union as the Section 9(a) representative of its laundry, housekeeping and janitorial employees when it took over these functions from Pritchard. The General Counsel argues that, because of its discriminatory refusal to hire the Pritchard employees, the Respondent has lost its right to rely on a lack of continuity in the workforce to avoid a successorship bargaining obligation. Under this theory, the Respondent's discriminatory hiring practices also deprived it of the right that a successor normally has to set initial terms and conditions of employment. The Respondent claims that the Respondent is not a successor to Pritchard for a number of reasons apart from the alleged discriminatory refusal to hire a majority of the Pritchard employees.

It is settled law that an employer who takes over a business, whose employees are represented by a union, and hires a majority of his employees from his predecessor's unionized workforce, has an obligation to recognize and bargain with the union regarding the employees' terms and conditions of employment, where there is otherwise a substantial continuity in the employing entity. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972). See also *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27 (1987). A successor employer cannot escape this bargaining obligation by discriminating in regard to hiring and retention of employees of the predecessor based on their union affiliation. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.,* 417 U.S. 249, 262 (1974); *Sierra Realty Corp.,* 317 NLRB 832 (1995), enf. denied on other grounds, 82 F.3d 494 (D.C. Cir. 1996); *U.S. Marine Corp.,* 293 NLRB 669, 670 (1989); enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992).

It is also well established that a successor employer is not bound by the predecessor's collective-bargaining agreement and, ordinarily, is free to set the initial terms and conditions of his employees. *Spruce Up Corp.,* 209 NLRB 194 (1974). However, where it is apparent from the start that the new employer plans to retain all or a majority of the predecessor's employees in the unit, it must first notify and bargain with the employees' union before making changes in the

established terms and conditions of employment. *Burns Security Services,* 406 U.S. supra at 294-295. Accord: *Galloway School Lines, Inc.* 321 NLRB 1422 (1996).

I have already found above that the Respondent in fact discriminated during the hiring process by essentially excluding the Pritchard employees from consideration until after it had hired a majority of its workforce. Where this is the case, the Board will presume that a majority of the new employer's employees would have been hired from the predecessor's workforce absent discrimination and will require the new employer to recognize and bargain with the union. *Waterbury Hotel Management LLC v. NLRB,* 314 F.3d 645 (D.C. Cir. 2003); *Sierra Realty Corp.,* 317 NLRB supra, at 835. The Board will also find, under the circumstances here, that a discriminatory refusal to hire a predecessor's employees deprives the successor of its right to set initial terms and conditions of employment. See *Galloway School Lines, Inc.,* 321 NLRB supra, at 1425-1427, and cases cited therein. I see no reason to depart from this precedent here.[60] Accordingly, I find, as alleged in the complaint, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by making unilateral changes in the wages, hours and other terms and conditions of employment of its housekeeping, laundry and janitorial employees.

Conclusions of Law

1. By promulgating and enforcing a discriminatory and overly broad no solicitation/distribution rule; threatening employees with being sent home if they engage in union and other protected concerted activities; denying union representatives access to employees working at the Respondent's facility; threatening to and causing the arrest of a union representative in the presence of employees; and making statements to employees implying that they would not be hired because of their membership in and support for the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), and Section 2(6) and (7) of the Act.

2. By discriminatorily refusing to hire the following former employees of Pritchard Industries because they were represented by the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3), and Section 2(6) and (7) of the Act:

Adrian Caicedo	Kathleen Nelson
Reese Dinkins	Gabriella Ortiz
Fabiano Filigrana	Santiago Restrepo
Carmen Garcia	Gustavo Sanchez
Jose Gavalo	Ivan Sanchez
Eleazar Mendoza	Jose Tobon

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All housekeepers, custodians and laundry attendants employed by the Respondent at its Hartford, Connecticut facility, excluding guards, professional employees and supervisors as defined in the Act.

[60] In reaching this conclusion, I have considered and rejected the arguments advanced by the Respondent in support of its claim that, even if there were continuity in the workforce, the Respondent was not a *Burns* successor. See *Sierra Realty Corp.,* 317 NLRB supra, at 835-836.

4. By failing and refusing to recognize and bargain with the Union, as the exclusive collective bargaining representative of the above-described unit, and by establishing the rates of pay, benefits, hours of work and other terms and conditions of employment for employees in the unit without prior notice to the Union and without affording the Union an opportunity to bargain about these subjects, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act in any other manner alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In *FES,* supra, the Board held that the appropriate remedy for a refusal to hire violation would include an order requiring the respondent to offer those applicants unlawfully denied employment immediate instatement to the positions to which they had applied, or if those positions no longer existed, to substantially equivalent positions, and to make them whole for any wages and benefits lost as a result of the unlawful refusal to hire them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). *FES,* 331 NLRB supra at 12. The Board held further, in *FES,* that where the number of applicants unlawfully denied employment exceeds the number of positions that were available, a subsequent compliance proceeding may be used to determine which of the applicants would have been hired. *Id*. at 14. In the instant case, but for the Respondent's discriminatory hiring scheme, there would have been enough available positions to accommodate all of the Pritchard employees who were discriminatorily denied employment with the Respondent. Accordingly, all of the alleged discriminatees are entitled to an offer of instatement under *FES.*

At the hearing, counsel for the Charging Party requested, as a remedy for the alleged unlawful arrest of the Union's representative, Maran, that the Respondent be ordered to make her whole for any costs she incurred as a result of the arrest. I shall recommend such a remedy which appears to be a reasonable one for the violation found.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[61]

ORDER

The Respondent, Downtown Hartford YMCA, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[61] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Promulgating and enforcing discriminatory and overly broad no solicitation/distribution rules.

(b) Threatening employees with being sent home if they engage in union and other protected concerted activities.

(c) Denying union representatives access to employees working at the Respondent's facility.

(d) Threatening to and causing the arrest of union representatives in the presence of employees.

(e) Making statements to employees implying that they will not be hired because of their affiliation with or representation by Service Employees International Union, 32BJ District 531, AFL-CIO ("the Union").

(f) Refusing to hire the former employees of Pritchard Industries because they were members of the Union, and in order to avoid having to recognize and bargain with the Union.

(g) Failing and refusing to recognize and bargain with the Union, as the exclusive collective bargaining representative of the employees in the following appropriate Unit:

All housekeepers, custodians and laundry attendants employed by the Respondent at its Hartford, Connecticut facility, excluding guards, professional employees and supervisors as defined in the Act.

(h) Establishing the rates of pay, benefits, hours of work and other terms and conditions of employment for employees in the unit without prior notice to the Union and without affording the Union an opportunity to bargain about these subjects

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the discriminatory and overly broad no solicitation/distribution rule announced on or about January 14, 2002.

(b) Within 14 days from the date of this Order, offer the employees named below immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

Adrian Caicedo	Kathleen Nelson
Reese Dinkins	Gabriella Ortiz
Fabiano Filigrana	Santiago Restrepo
Carmen Garcia	Gustavo Sanchez
Jose Gavalo	Ivan Sanchez
Eleazar Mendoza	Jose Tobon

(c) Make the employees named above whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(f) On request of the Union, rescind any departures from the terms and conditions of employment that existed immediately prior to the Respondent's takeover of Pritchard Industries operations at the Respondent's facility and restore, retroactively, the preexisting terms and conditions of employment until the Respondent negotiates in good faith with the Union to agreement or impasse.

(g) Make whole Unit employees for any loss of wages and benefits resulting from the Respondent's unilateral changes in the preexisting terms and conditions of employment.

(h) Make Rebecca Maran, the Union's staff representative, whole for any costs she incurred because of her arrest on January 21, 2002 at the Respondent's facility.

(i) Within 14 days after service by the Region, post at its facility in Hartford, Connecticut copies of the attached notice marked "Appendix."[62] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 10, 2002.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[62] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT adopt or enforce discriminatory rules prohibiting employees from engaging in union solicitation and distribution during non-work times and in non-work areas of our facility.

WE WILL NOT refuse to hire any employees of Pritchard Industries who previously worked at our facility and who were represented by Service Employees International Union, 32BJ District 531, AFL-CIO ("the Union"), or otherwise discriminate against these employees, in order to avoid having to recognize and bargain with the Union.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All housekeepers, custodians and laundry attendants employed by the Respondent at its Hartford, Connecticut facility, excluding guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of our unit employees without first giving notice to and bargaining with the Union about these changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the discriminatory and overly broad no solicitation/distribution rule announced on or about January 14, 2002.

WE WILL, within 14 days from the date of the Board's Order, offer the following employees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Adrian Caicedo
Reese Dinkins
Fabiano Filigrana
Carmen Garcia
Kathleen Nelson
Gabriella Ortiz
Santiago Restrepo
Gustavo Sanchez

Jose Gavalo	Ivan Sanchez
Eleazar Mendoza	Jose Tobon

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from our discriminatory refusal to hire them, less any net interim earnings, plus interest.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above described bargaining unit.

WE WILL, on request of the Union, rescind any departures from the terms and conditions of employment that existed immediately prior to our takeover of Pritchard Industries' operations at our facility and restore, retroactively, the preexisting terms and conditions of employment until we negotiate in good faith with the Union to agreement or impasse.

WE WILL make our unit employees whole for any loss of wages and benefits resulting from our unilateral changes in the preexisting terms and conditions of employment.

WE WILL make whole the Union's representative, Rebecca Maran, for any costs incurred as a result of our having caused her arrest on January 21, 2002.

DOWNTOWN HARTFORD YMCA

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

280 Trumbull Street, 21st Floor, Hartford, CT 06103-3503

(860) 240-3002, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (860) 240-3524.